

Public Utilities

FORTNIGHTLY



January 9, 1930

WHY THE STATE COMMISSIONS OPPOSE THE COUZENS BILL

By John E. Benton

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The Menace of Rate Regulation

By Roger W. Babson

PAGE 16

Will the Street Railway and the Bus Be Taxed Out of Business?

By Walter Jackson

PAGE 24

The Propaganda Against the Utility Commissions

By Henry C. Spurr

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WASHINGTON, D. C.**

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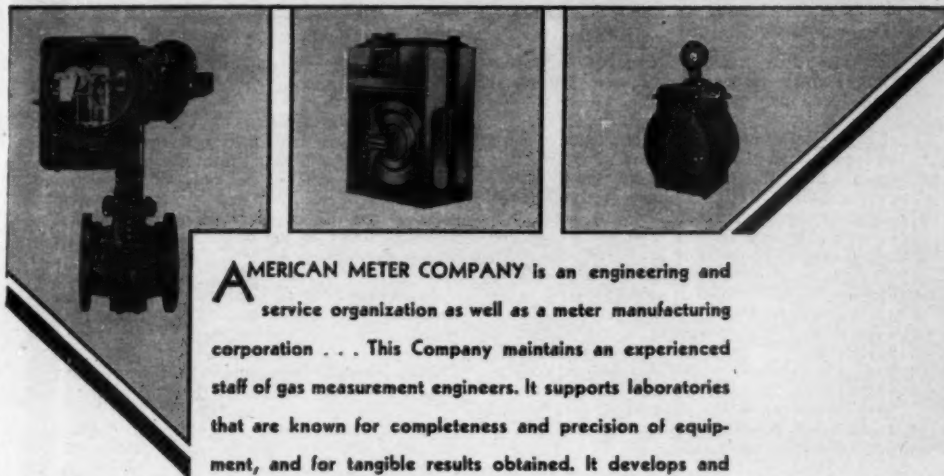
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PUBLIC UTILITIES REPORTS, INC., PUBLISHERS

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Pages with the Editors

WITH this number, PUBLIC UTILITIES FORTNIGHTLY enters upon a new year—and a new volume.

THE twelve months just ended have been the most successful in the history of this magazine, as measured not only in its material growth (its circulation has increased about 300 per cent during the past year), but more particularly in the position it has attained and the recognition which has been accorded to it as an outstanding authority in the special field which it occupies.

THE problems incidental to regulation of public utilities have been growing steadily from the days of Noah's Ark—when controversies of a violent character are reported to have arisen over the alleged discriminatory service that this first common carrier of record offered to the public.

THE legal aspects of regulation, the economic phases of the subject as well as the financial and the political angles of it, are of definitely more than mere academic interest to those charged with the responsibilities of directing America's public utilities; they are of ever-present and vital importance.

IF the present system of regulation of public utilities is to prove successful—and there are many who proclaim vehemently against it—the courses of our industrial leaders, of our legislators and of our regulatory bodies

must be guided by experience, by facts and by sound judgment.

THE editors of PUBLIC UTILITIES FORTNIGHTLY believe that such pertinent facts as are obtainable and that the most authoritative opinion in the country not only should be but must be submitted for consideration if wise policies are to be pursued and successful solutions found to the problems that confront the utility industry.

IF we remember correctly, it was ABRAHAM LINCOLN who observed: "No question is settled until it is settled right."

THAT remark aptly applies to the problems involved in the regulation of public utilities.

IN pursuance of the editorial policy which this magazine has adopted (and which, incidentally, is meeting with the unanimous approval of all fair-minded advocates of the various groups, representing many and conflicting opinions, into which our readers are divided), PUBLIC UTILITIES FORTNIGHTLY will publish during the year 1930 authoritative and comprehensive articles on both sides of controversial questions within the field of regulation.

ONLY on the basis of such facts and opinions can sound policies be evolved that, in the long run, will serve the public interest.

AMONG the more important problems that confront the regulatory commissions and the utilities are that which involve that broad subject designated as "public relations."

AS ROGER W. BARSON states on page 15 of this issue, "the most important department of every utility company today is its public relations department."

WHY MR. BARSON considers this subject of such great importance at this time, and what he believes should be done about it, will be told in a series of articles that will begin in the next issue of this magazine—out January 23.

JOHN E. BENTON, whose article "Why the State Commissions Oppose the Couzens Bill" appears on pages 3 to 14 of this issue, is the General Solicitor of the National Association of Railroad and Utilities Commissioners, with offices in Washington, D. C.

(Continued on page VIII)



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JOHN E. BENTON



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WALTER JACKSON

WHILE MR. BENTON'S contribution expresses the author's personal views on the Couzens Bill, at the same time it reflects the attitude of the State Commissions as a group; because of the official position of the author, his article assumes the character of a semi-official utterance.

MR. BENTON is a typical New Englander. He was born in Vermont in 1875; was admitted to the Massachusetts bar in 1898 and to the New Hampshire bar in 1900, and practiced law in the latter state until 1918.

MR. BENTON was the author of the Public Service Commission Act of New Hampshire; served on the New Hampshire Commission from 1911 till 1915; was Solicitor of the Bureau of Valuation of the Interstate Commerce Commission during 1918 and 1919, and during the past ten years has served in his present office at the Capital.

WALTER JACKSON, on pages 16 to 20 of this number, tackles a timely subject on which he is widely recognized as an authority—electric railway and motor bus fares and service.

MR. JACKSON is, indeed, the expert on these subjects for the American Public Utilities Bureau of New York; he has contributed several articles on the subject to this magazine.

THE gradual increase in the assessments imposed upon the street railway and bus lines is presenting a problem that Mr. JACKSON views with misgivings; his prophecies about the ultimate development in urban and interurban transportation will be read with interest not only by those asso-

ciated with these utilities but also by the regulatory authorities.

How should those utilities be regulated—specifically the electric light and power companies, the gas companies and the motor bus companies—whose activities are more and more extending beyond the geographical confines of the States and thus coming within the jurisdiction of the Federal regulatory bodies?

THIS is one of the increasingly-important questions that will serve as the basis of an article by HON. THOMAS J. TINGLEY, formerly the People's Counsel of the Maryland Public Service Commission, which will appear in the next number of this magazine.

ARE improper tax assessments on public utilities property imposing an unfair burden upon the ratepayer?

THIS pertinent topic will be tackled in the coming issue of PUBLIC UTILITIES FORNIGHTLY by W. M. MCFARLAND—who takes the opportunity of making some criticisms that utility officials may regard with more than casual interest.

ONE of the outstanding rate controversies of the year was finally decided when the Supreme Court of the United States upheld the right of the Los Angeles Railway Corporation to charge a 7-cent fare instead of the 5-cent fare provided for in its franchise. (See page 1 of *Public Utilities Reports* section.)

THE refusal of this same court to give relief to the traction companies in New York City had aroused speculation as to the outcome in the California case. It appears, however, that while in New York authority to enter into a contract had been expressly conferred by the legislature, this authority had not been granted to the city of Los Angeles.

THE present value rule works both ways. We have seen instances in which original cost, or a prior rate base plus additions, has been rejected as the basis of rates because it did not give the public utility full present value. The Capital Traction Company has been denied authority to increase rates where its proof of value was based upon a former determination plus the net cost of additions and betterments to date. (See page 25.)

OPERATIONS of a profitable electric utility and an unprofitable railway department owned by a company doing business under a franchise have received the attention of the Tennessee Commission. (See page 41.)

THE next issue will be out January 23.

—THE EDITORS.

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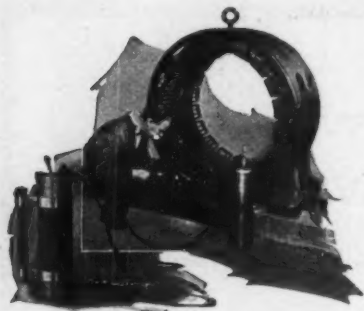
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JANUARY



*Reminders of
Coming Events*

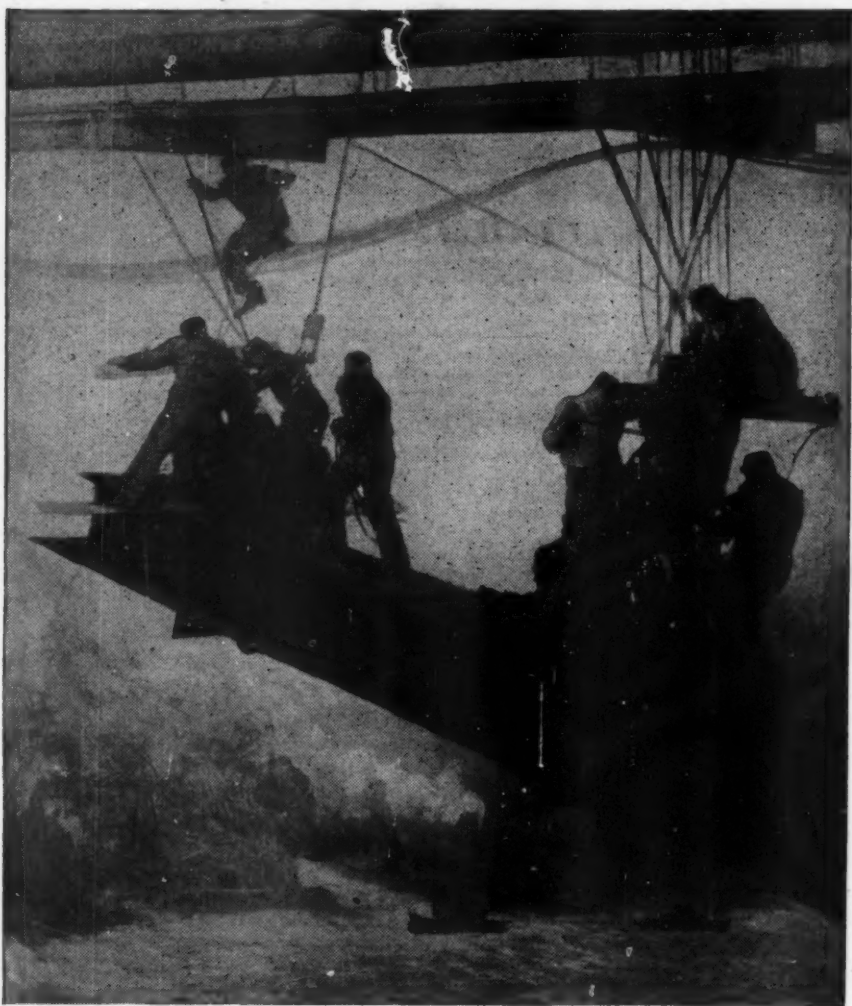
ALMANACK

*Notable Events
and Anniversaries*

9	T ^h	The first international rail-air service in the Americas was established by the Pan-American Airways, Inc., between the U. S. and points in Central America, 1929.
10	F	Passengers on the <i>New Orleans</i> , the first steam passenger boat on the Mississippi, were landed at New Orleans after a 3-months trip from Pittsburgh, 1812.
11	S ^a	Coal stoves were installed in the street cars of Ansonia, Conn. when the traditional bundle of straw on the floor proved inadequate to warm the passengers, 1889.
12	S	A dream of JAMES J. HILL, the old "Empire Builder," was realized with the opening of the Cascade railroad tunnel in Washington—the largest in the world—1929.
13	M	The financial reports of the railroads leading to Chicago showed losses due to the panic rather than profits anticipated by World Fair traffic, 1893.
14	T ^s	The practical possibilities of transoceanic radio telephony were demonstrated by the Bell System officials in New York, who talked to London for two hours, 1923. 
15	W	The first railroad locomotive to be built in the United States for actual service on tracks in this country was completed, 1831.
16	T ^h	JOHN B. McDONALD was awarded the \$35,000,000 contract for building the first subways in New York, 1900.
17	F	GEORGE WESTINGHOUSE bought the patent rights to a new device called a "transformer," invented by two Frenchmen, FAULARD and GIEBS, 1884.
18	S ^a	The Illinois Central Railroad was incorporated, 1836. Manufactured gas was exhibited in a public museum in Philadelphia, 1795.
19	S	The first United States patent was issued for the modern trolley car system, 1892. DR. ROBERT HOOKE of England alluded to the possibilities of telephony, 1667.
20	M	The Vermont legislature approved an act for changing the name of the Board of Railroad Commissioners to "Public Service Commission," 1909.
21	T ^s	WILLIAM WATSON helped pave the way for the electrical industry when he transmitted current over a circuit consisting of 2 miles of wire and 2 of ground, 1747. 
22	W	The modern taxicab is the descendant of the individual public vehicle that made its first appearance before the <i>Hotel de St. Fiacre</i> in Paris, 1640.

A PUBLIC utility can only do business as long as the community is satisfied with its manner of doing it, and its right to do it depends upon the continued good will of the community it serves.

—PRESTON S. ARKWRIGHT



From a painting by
Fred Dana Marsh

Builders of Empire

"When we have discovered a continent, or crossed a chain of mountains, it is only to find another plain upon the further side. . . . O toiling hands of mortals! . . . Soon, soon, it seems to you, you must come forth on some conspicuous hilltop, and but a little way further, against the setting sun, descry the spires of El Dorado."

—ROBERT LOUIS STEVENSON

Public Utilities

FORTNIGHTLY

VOL. V; No. 1



JANUARY 9, 1930

Why the State Commissions Oppose the Couzens Bill

By JOHN E. BENTON

GENERAL COUNSEL

NATIONAL ASSOCIATION RAILROAD AND UTILITIES COMMISSIONERS

"RESOLVED, That this Association is unalterably opposed to U. S. Senate Bill No. 6 and its amendments, or to any enlargement of Federal authority by the creation of new agencies or the enlargement of the authority of present agencies whereby the regulatory authority of the State Commissions would be interfered with in a field where they are now adequately functioning."

THE above resolution, reported by its Committee on Legislation, and approved by its Executive Committee, was by unanimous vote adopted by the National Association of Railroad and Utilities Commissioners at its annual convention held at Glacier National Park August 27-30, 1929.

It is aimed, as appears upon the face of it, at Senate Bill 6, commonly called the Couzens Communications Commission Bill.

No bill ever before introduced into Congress has caused so much apprehension, and such earnest opposition, on the part of state regulatory officials.

Introduced by Senator Couzens, Chairman of the Senate Committee on Interstate Commerce, on April 18, 1929, and referred to Senator Couzens' own Committee, the bill has behind it the force of its author's ability and vigorous personality, enhanced by the prestige and influence

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which attach to his official position as chairman of a powerful committee. Hearings are in progress, although just now temporarily suspended pending disposition of tariff legislation. Together with the bill are certain amendments, also presented by Senator Couzens, on June 4, 1929, extending the scope of the bill. These are being considered by the committee, and will be herein discussed as if a part of the bill itself.

IF reason is sought for the degree of unanimity which exists among state regulatory officials in their opposition to the Couzens bill and its amendments, it may be found in the fact that many of such officials were in service when Transportation Act, 1920, was passed. They know from their own experience the effect of that legislation upon state regulation of railroad rates and service, and they fear a like experience in the public utility field would result from the enactment of the legislation proposed by Senator Couzens.

"It is of the essence of this (Federal) power that, where it exists, it dominates," Justice Hughes said in *Houston, East & West Texas R. Co. v. United States*, 234 U. S. 342, 350. In the nature of things this must be so. A part can not be stronger than the whole. For the purpose of all action deemed necessary by it within the jurisdiction given to it by the Constitution, the Federal Government must have dominant power. But this does not mean that it should *exercise* such power wherever it constitutionally may.

THE theory of our Constitution is that the Federal Government

shall act only in those matters which affect the Nation as a whole, interfering in the least degree possible with the states in matters which are local. Power to act respecting countless matters, under the elastic provisions of the Constitution, is lodged with Congress, and it is left to judge when need for the exercise of that power as to any matter has arisen. When it is proposed, therefore, that the Federal Government shall enter a new field of activity, the important question for determination is not whether it is within the constitutional power of the Congress to act, but whether such a state of affairs exists that the welfare of the Nation demands Federal action. Necessity alone justifies an extension of Federal activities at any time.

WHEN the Federal Government does occupy any field, however, because its power is dominant, state power of action within the same field is either wholly excluded or greatly circumscribed. The states may thereafter act only so far as state action does not conflict with Federal action. They may occupy only so much of the field as is reserved to them by Congress, when the field is one within the limits of Federal power. And when controversy arises respecting the extent to which Congress has granted power to a Federal agency which operates to exclude or limit state power, decision necessarily rests with the Federal Courts. In cases where questions of governmental power are involved courts now, just about as much as in the days of the Stuarts, show an inclination to decide in favor of the Government whose Commissions they hold. Judges are but men, and human

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judgment is fallible. Their high-minded purpose may not be impugned; but it can not be denied, either, that in disputes involving a division of power between state and Federal agencies, the state agencies do not fare very happily at the hands of the Federal Courts.

THE experience of the states under legislation enacted by Congress for the regulation of railroads well illustrates the truth of this statement.

When the Act to Regulate Commerce was passed in 1887, the first section provided expressly:

"That the provision of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state."

For more than twenty years the Commission understood that the transportation of persons or property between points within one state, without at any point passing out of the state, was "wholly within one state," and hence wholly unaffected by any requirement or prohibition of the Act. But in the so-called Shreveport Case (23 Inters. Com. Rep. 31), the Commission assumed jurisdiction to make an order which had the effect of increasing intrastate railroad rates in Texas. And the Supreme Court (in *Houston, East & West Texas R. Co. v. United States*, from the opinion of which quotation has already been made) sustained its action, saying in substance, that the transportation was not "wholly within one state" if the rate at which it was enjoyed gave shippers of that state undue advantage over shippers outside the state desir-

ing to ship into the state. Thus was language, by construction, deprived of its natural meaning to make the statute provide what Federal Commissioners and judges thought it ought to provide.

AGAIN, in Transportation Act, 1920, amendments were adopted depriving the states of jurisdiction to control the building of new lines of railroad, and the extension or abandonment of existing lines, by granting jurisdiction to the Interstate Commerce Commission to control such new construction or abandonment. Exception, however, was made by the express provision, in paragraph (22) of § 1, that the authority granted the Federal Commission should "not extend to the construction or abandonment of spur, industrial, team, switching, or sidetracks, located or to be located wholly within one state."

This exception was incorporated into the amendment, when the Transportation Act was being framed, at the express request of Hon. Charles E. Elmquist, then general solicitor of the National Association of Railroad and Utilities Commissioners, for the express purpose of saving state jurisdiction over the classes of tracks described. At the time it was not believed that the language was of doubtful meaning. It was first construed in *Texas & P. R. Co. v. Gulf, Colorado & Santa Fe R. Co.* 270 U. S. 266. In that case the Santa Fe had built a track less than 8 miles long, and at no point $3\frac{1}{2}$ miles distant from the main line, wholly within the state of Texas, to reach certain industries also on the lines of the Texas & Pacific. The track was

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used for the movement of freight only from and to those industries, in exactly the same manner as freight is ordinarily moved over industrial tracks. Because the track built would enable the Sante Fe to obtain business from the territory previously served by the Texas & Pacific alone, the Supreme Court said that it must be held an "extension" and not an industrial track or a spur track, "although the line be short, and *although the character of the service contemplated be that commonly rendered to industries by means of spurs or industry tracks.*"

Again, by construction, language was denied its common meaning for the purpose of enabling the Federal Commission to exercise power which otherwise it could not have exercised.

THE same paragraph also provides that the authority over construction and abandonment granted the Interstate Commerce Commission "shall not extend to . . . street, suburban, or interurban electric railways not operated as a part or parts of a general steam railroad system." This exclusion language was prepared by the American Electric Railway Association, which represents 30 per cent of the electric railway mileage of the country, and was presented by that Association to the Senate Committee, while the Transportation Act was being framed, *for the express purpose of excluding all electric railroads.*

Mr. Elmquist, on behalf of the state regulatory Commissions, made a like request that all electric railways be excluded, and presented substantially similar language. Yet the Interstate Commerce Commission con-

strued the language, after it had been accepted by Congress and incorporated into the amendment, as not covering any electric railroad engaged in an important way in interstate transportation of freight, interchanged with other carriers. This ruling was made in a case involving the Piedmont & Northern Railway (138 Inters. Com. Rep. 363), an electric road heretofore constantly classed by the Interstate Commerce Commission and its several bureaus as an interurban. When the validity of this order was contested it was sustained by the Federal Court (Piedmont & Northern R. Co. v. United States, 30 F. (2d) 421.)

Other examples might be cited. These are sufficient to show that it is difficult, if not impossible, to use words which will insure state power in any field from invasion and destruction once a Federal agency is empowered to act within that field.

This accounts for a feeling widely held among State Commissioners that the only way to preserve state jurisdiction within a given field from destruction is to refrain from authorizing any Federal agency to enter that field. They have little faith that language, included in any statute, designed for the preservation of state powers will prove efficacious for that purpose when subjected to the construction of Federal Commissioners and courts.

PARAGRAPH (a) of § 1 of the Couzens Bill provides:

"That the provisions of this Act shall apply to all common carriers engaged in the transmission of intelligence by wire or wireless *but shall not apply to the transmission of in-*

"Federalism Run Mad"

"It seems federalism run mad to propose to bring every telephone company in the United States to Washington for approval of its securities issues, and for determination of the amount it shall set aside for depreciation, and for its general supervision and to bring the telephone users, even local exchange subscribers, of these same companies also to Washington for the ultimate decision as to what their rates shall be. Yet this is what the Couzens Bill will do if it is enacted. It is because the State Commissioners know this that they so unanimously protest its passage."

telligence by wire or wireless wholly within one state."

This paragraph, and other provisions in the Act, doubtless indicate a desire on the part of the author of the bill to leave state authority over intrastate business undisturbed, but the saving language, which I have italicized, can not be expected to be more effective in this Act, once it is placed upon the statute books, than the same language has heretofore proved to be in the Act creating the Interstate Commerce Commission.

THE Couzens Bill, as proposed to be amended by its author, consists of 47 sections. The first is devoted to definitions. The remaining sections may be divided into three parts:

First, there is the part relating to carriers engaged in radio transmission only;

Second, the part relating to carriers that transmit intelligence by wire and wireless;

Third, there is the part relating to companies which transmit elec-

trical energy in interstate commerce.

Sections 2 to 34, inclusive, apply to carriers engaged in radio transmission. A permanent commission of five members is created, to which are to be transferred the powers of the present Radio Commission, and to which additional powers are to be granted. That commission would take the place of the present Radio Commission.

By the provisions of the Radio Act of 1927, which created the commission, all the powers of the commission, except with respect to the revocation of licenses, were to pass to the Secretary of Commerce at the end of one year. Thereafter the commission was to continue to exist simply as a tribunal for the hearing of appeals from the Secretary of Commerce, and for the decision of questions referred to it for opinion by the Secretary of Commerce. It appears to have been the belief of Congress, when that Act was passed, that assignments of wave lengths and other rights for radio operation could be made by the commission within a year and that thereafter

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there would be no further occasion for continuance of the commission with full powers.

Experience, however, has demonstrated the error of this assumption, and the life of the commission, with all the powers originally granted to it, has been twice extended—by an act of Congress approved March 8, 1928, till March 16, 1929, and again by an act approved March 4, 1929, till December 31, 1929.

It is now generally conceded that proper regulation of radio operation requires a permanent commission, the members of which shall receive such salaries and enjoy such terms of service as shall afford them opportunity to become experts in the highly technical matters with which the commission has to deal.

No opposition has been voiced by State Commissioners to the enactment by the Federal Congress of legislation designed to provide permanently for regulation of radio operation. The nature of radio transmission is such that effective regulation by the state appears not practicable nor possible. There is, therefore, apparently no disposition on the part of State Commissioners to object to whatever legislation may to Congress appear necessary for the regulation of radio operation.

When, however, we turn to §§ 35 to 46 of the bill, inclusive—so far as the same relate to carriers which transmit intelligence by wire—the attitude of State Commissioners is widely different, especially as concerns telephone companies, in the regulation of which State Commissioners were the pioneers.

Paragraph (c) of § 1 of the Couzens Bill contains the following definition of the term "common carrier:"

"(c) The term 'common carrier' as used in this Act shall include all telegraph, telephone, cable, and/or radio companies and/or any other persons, natural or artificial, engaged in the transmission of intelligence for hire. Whenever the word 'carrier' is used in this Act it shall be held to mean common carrier."

Every public utility engaged in the transmission of intelligence by wire is thus to be brought within the new Act.

For the purpose of vesting in the new commission power to regulate the various classes of these carriers, provisions now in the Interstate Commerce Act have been incorporated in the Couzens Bill. Certain of those provisions are designed to give to the new commission powers which the Interstate Commerce Commission now has over carriers engaged in the transmission of intelligence, and others have been incorporated to give to the new commission powers which the Interstate Commerce Commission now has as to rail carriers, but does not have as to carriers engaged in the transmission of messages.

In other words, the new commission is to be granted much broader powers over companies engaged in the transmission of intelligence than the Interstate Commerce Commission now has over those companies.

THE Interstate Commerce Commission, under the Interstate Commerce Act, now has jurisdiction over the rates of "telegraph, telephone, and cable companies operated by wire or wireless," and may fix

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maximum or minimum rates for such companies after hearing upon complaint or upon its own motion.

The present law, however, does not require such companies to file their rate schedules with the Interstate Commerce Commission and it gives the Commission no power to suspend new rates, as it may do in the case of new rates of rail carriers.

The Couzens Bill would give the proposed new commission, as to these companies which transmit intelligence, the same rate-making power which the Interstate Commerce Commission now has in the case of those companies, and in addition thereto would make it the duty of such companies to file their rate schedules with the new commission, as rail carriers are now required to file their rate schedules with the Interstate Commerce Commission. It would also give to the new commission the power of suspension. To accomplish these purposes sections have been incorporated from the Interstate Commerce Act, some of which in that Act relate to telephone, telegraph, and cable companies, and others of which relate to rail carriers only.

The power which the Interstate Commerce Commission now has under § 13, paragraph (4), to prescribe intrastate rates in so-called discrimination cases, is given to the proposed new commission, as respects the rates which would be subject to its jurisdiction, in the precise language in which it is, in said § 13, paragraph (4), given to the Interstate Commerce Commission.

This is one of the rate-making provisions which was inserted in the Interstate Commerce Act by Transpor-

tation Act, 1920. It is under that provision that the Interstate Commerce Commission has power, upon making a finding of discrimination, to strike down any intrastate rate, and to substitute therefor a rate made by itself.

At one time, shortly after Transportation Act, 1920, was passed, more than a score of state-wide orders made by the Interstate Commerce Commission were in effect nullifying state railroad rates. In some states, such as the great states of Illinois, Indiana, Texas, and Nebraska, every intrastate freight and passenger rate applicable within those states was held discriminatory and rates made by the Interstate Commerce Commission were substituted therefor.

In what is known as the Wisconsin Passenger Fare Case (257 U. S. 563, P.U.R.1922C, 200) the United States Supreme Court ruled, in effect, that the Interstate Commerce Commission might hold state made rates discriminatory if in the opinion of the Commission they did not yield needed revenue to the carriers. This made the Interstate Commerce Commission the ultimate judge of the sufficiency of every railroad rate, as the Couzens Bill would make the proposed new Communications Commission the ultimate judge of the reasonableness of every telephone rate.

The orders of the Interstate Commerce Commission just referred to prescribing intrastate railroad rates produced such an intolerable situation that the Interstate Commerce Commission itself ultimately dissolved most of those orders. The situation while the orders were in force, however, is still very vividly in the minds

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of State Commissioners; and they naturally view with alarm the proposition of vesting power to make the same kind of orders as to telephone rates in the hands of the proposed new Communications Commission.

IN the case of the telephone companies, too, the situation is widely different from that which existed as to the rail companies when Congress was enacting Transportation Act, 1920. That Act was designed for the rail carriers which were on the point of being turned back to their owners after Federal control. The business of the railroads was mainly interstate in character, only about 15 per cent being intrastate. The telephone companies, on the other hand, are so largely local in their operation that far less than 15 per cent of their business is interstate in character. Every telephone company, however, is an interstate carrier, by reason of its transmission of interstate toll messages.

That this may be made the basis for the exercise of Federal jurisdiction over all the activities of these companies is not doubted. As Justice Hughes said of the Federal power, in words already quoted, "It is of the essence of this power that where it exists, it dominates." However slight the interstate business done, it affords a basis for Federal action. But it would be a case of "the tail wagging the dog," and a misuse of the power lodged by the Constitution in the Federal Government for the Congress to open the way for the states to be deprived of their control of telephone companies simply because the very small interstate business they do gives Congress that power.

THE bill would also give the new commission the same power to control accounts and reports of companies which transmit intelligence as the Interstate Commerce Commission has over the accounts and reports of carriers subject to its jurisdiction. For this purpose appropriate sections have been incorporated from the Interstate Commerce Act. Included is paragraph (5) of § 20, which makes it the duty of the commission to prescribe the depreciation charges of all carriers subject to the Act.

Under this provision the new commission would be obliged to prescribe the depreciation charges for every telephone company, however slight its participation in interstate business. This paragraph is one of the Transportation Act amendments which has always been obnoxious to State Commissioners. Inasmuch as the amount properly allowable for depreciation is a very important factor in every rate case, this provision alone amounts to a substantial invasion of the field of local rate regulation.

IT seems federalism run mad to propose to bring every telephone company in the United States to Washington for approval of its securities issues, and for determination of the amount it shall set aside for depreciation, and for its general supervision, and to bring the telephone users, even local exchange subscribers, of these same companies also to Washington for the ultimate decision as to what their rates shall be.

Yet this is what the Couzens Bill will do if it is enacted. It is because the State Commissioners know this that they so unanimously are

The Proposed Discrimination Against Privately-Owned Power Plants

"PRVATELY owned generating plants and those publicly owned are not to be permitted to compete on equal terms. Those that are privately owned are to be subjected to this disability in selling their power to distributing companies—that those who purchase from them will be subject to Federal regulation, while those who purchase from publicly owned generating plants will escape such regulation. The latter may charge what rates they will and give what character of service they will, so far as the Federal Government is concerned; but the former, who buy from privately owned plants, will be subjected to the regulation which the Act provides."

making this protest to its passage.

THE suggestion that the Interstate Commerce Commission now possesses some of the powers that are proposed to be granted to the new Communications Commission does not allay the opposition of the State Commissioners. The Interstate Commerce Commission has not sought to exercise its powers over telephone rates except when the exercise of those powers has been invoked by formal complaints. It is evidence both of the local character of the telephone service and of the satisfactory manner in which the State Commissions have exercised their jurisdiction, that in the almost two decades during which the Interstate Commerce Commission has possessed power to regulate telephone rates it has not yet been asked to exercise that power in a single case of consequence. Hence it is that the Interstate Commerce Commission has never invaded the state regulatory

field in the case of telephone companies.

Now, however, the reason assigned by some for enactment of the Couzens Bill is that the Interstate Commerce Commission has not been active enough in the telephone field.

If a new commission shall be created, with jurisdiction only over companies engaged in wire and wireless transmission, and with powers to institute rate investigations on its own motion, it may not be expected that it will await the presentation of complaints by those who feel the need of invoking its jurisdiction. It will naturally aim to justify its existence by action. It is, accordingly, generally believed by State Commissioners that the enactment of this legislation would in a substantial degree entail the ultimate destruction of state regulatory power in the case of all the companies which are by the bill placed under the jurisdiction of the new Communications Commission.

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SECTION 47 of the bill is the section relating to power companies. It would transfer to the proposed new commission the powers and duties of the existing Federal Power Commission, and in addition would subject interstate electric service, and the rates therefor, to Federal regulation through the proposed new commission. Those paragraphs of the section which merely transfer to the proposed new commission existing powers of the Federal Power Commission call for no comment. Those which create new law extend only to the matters of rates and continuance of service; and the right to make complaint touching those matters is to an extent limited.

Furthermore, different machinery for administration of this section of the law is provided than is provided by earlier sections for the companies which transmit intelligence. There is also a peculiar exception in paragraph (i) of the section, whereby the entire section is made inapplicable "to power generated in any plant owned wholly by the United States or any governmental agency thereof or wholly by any state or political subdivision thereof." As to rates and charges for such power, when transmitted in interstate commerce, there is no provision for regulation in the bill.

THIS is one of the most unaccountable provisions of the bill. Privately owned generating plants and those publicly owned are not to be permitted to compete on equal terms. Those that are privately owned are to be subjected to this disability in selling their power to distributing companies—that those who purchase from

them will be subject to Federal regulation, while those who purchase from publicly owned generating plants will escape such regulation. The latter may charge what rates they will and give what character of service they will, so far as the Federal Government is concerned; but the former, who buy from privately owned plants, will be subjected to the regulation which the Act provides.

Unauthorized abandonment of service and unjust and unreasonable rates are made unlawful for companies which are subject to the act. The right to make complaint of such abandonment or of the reasonableness of rates for such service, however, is limited in the manner following:

Paragraph (c) of the section provides that complaint may be filed with the proposed new commission by any State Commission with respect to rates or charges, and that any producer or distributor of power transmitted in interstate commerce may make complaint with respect to abandonment of service. There is in paragraph (c) no provision for complaint by others.

The paragraph further provides that when such a complaint shall be filed it shall by the commission be referred to a Federal agency, to be known as a joint board, composed of one representative of each state in which the power is produced or consumed. Such representative of a state is to be appointed as the state shall by law have provided, and if no provision shall have been made, he shall be appointed by the State Commission, if there be a State Commission having jurisdiction in the state over electric rates, and if there be no

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such State Commission, then by the governor.

Paragraph (d) of the section provides that the decision of a joint board shall be filed with the commission and shall become the determination of the commission *unless exceptions thereto are filed with the commission by any party to the proceeding within thirty days. If such exceptions are filed, the Federal Commission takes appellate jurisdiction of the proceeding, and makes determination thereof upon the record made before the joint board, or after hearing additional evidence, in its discretion.*

Paragraph (h) of the bill, also, provides as follows:

"Notwithstanding the foregoing provisions of this section, nothing herein shall be construed to abridge the jurisdiction or authority of any state to regulate, to the same extent as if this Act had not been passed, the rates and charges for the sale to consumers within the state of any power transmitted in interstate commerce or the abandonment of such power service, unless a substantial number of the consumers of such power (to be determined by the commission in accordance with such regulations as it shall prescribe) file with the commission a petition requesting Federal regulation of such rates, charges, and service under this section. Upon the filing of any such petition the foregoing subdivisions of this section shall apply with respect to such rates, charges, and service, and such petition shall have the same effect as a petition of a State Commission under subdivision (c) of this section."

THE provisions of this paragraph are novel. They seem to evidence a desire to preserve state regulation. Under paragraph (c), the

complaint paragraph, we have seen that only a State Commission may put in issue before the Federal Commission the reasonableness of rates and service of companies transmitting power. This paragraph (h) starts out with the provision that nothing contained in the section "shall be construed to abridge the jurisdiction or authority of any state," but immediately proceeds with a clause which opens wide the door to complaints by individuals. Whenever a substantial number of consumers invoke the action of the Federal Commission, it may exercise jurisdiction, and the Federal Commission is left to determine what constitutes "a substantial number."

AT the present time, in the absence of legislation by Congress, the states may regulate the rates exacted for electric service upon local distribution, even though the power distributed may be transmitted in interstate commerce. This was settled by the opinion of the United States Supreme Court in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, P.U.R.1920E, 18, and the principle of that case was recognized in *Public Utilities Commission v. Attleboro Steam & Electric Co.* 273 U. S. 83, P.U.R.1927B, 348. Accordingly, all local distribution of electricity is subject to state regulation. The enactment of the bill proposed by Senator Couzens, however, would constitute an occupation of the field by Congress, and such state power of regulation would be ended—at least whenever a "substantial number" of consumers, being dissatisfied with rates fixed by the state authorities,

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make application to the Federal Commission.

WHILE the Federal regulation of companies engaged in transmitting electric power is much less broad in scope than the regulation provided for companies engaged in the transmission of intelligence by wire or wireless, *it involves the field of rate making, and the Federal Commission is made supreme.* In any rate case, however just the decision, there is likely to be a "substantial number" of dissatisfied consumers. The Couzens Bill opens the way for them to try their case again before the Federal Commission, and puts upon other consumers who are satisfied, and upon the state authorities, the burden of defending the State Commission's rates in protracted proceedings before a joint board, and later before the Federal Commission itself upon appeal. And upon the appeal the Federal Commission may take new evidence. This will enable parties to hold back their evidence before a joint board,

and have their trial before the Federal Commission. Under such an appeal provision the joint board proceedings, in which state representatives may have a part, can amount to but little.

SUMMARILY stated, the greatest objection to the proposed legislation is this:

That regulation of telephone companies and power companies, which are distinctly local in the character of the main part of the services they render, is taken from local State Commissions and vested in a Federal board in Washington.

As to companies transmitting intelligence by wire or wireless this transfer is made with all the open directness of the most obnoxious Transportation Act provisions, and as to companies engaged in the transmission of electric power it is done less directly and openly, but just as certainly.

It is the Federal Commission in the end that is to determine what may be done.

A Transportation Utility Must Anticipate a City's Growth

"N*o city can get along without a public transportation system. No city can long have a public transportation system, worthy of the name, unless it makes money. Such a system, to perform well its purpose, must not only keep pace with the city's growth but largely anticipate that growth. Obviously then, a successful public transportation system must not only earn money enough to make the enterprise profitable but the profit must be large enough to carry the burden of extending lines into new territory in anticipation of city development."*



The Menace of Rate Legislation

PUBLIC utilities have nothing to fear from a decline in customers for many years to come. The number of kilowatt hours and the number of cubic feet of gas consumed will continue to increase throughout our lifetime.

Public utility companies, however, have much to fear in connection with rate legislation, as there will be a distinct effort on the part of the public to reduce rates to keep net earnings within a reasonable percentage of actual valuation.

This means that the most important department of every utility company today is its public relations department.

The company which has the best public relations is the company which will have the least to fear from rate regulation and will be most profitable to the stockholders.

Roger W. Babson

IN line with Mr. BABSON's observations, the next issue of this magazine will contain the first of a timely series of articles dealing with the public relations activities of the public utilities. The first of this series will be contributed by ROGER W. BABSON; the second by IVY LEE; another by BERNARD L. BERNAYS; these will be followed by other articles which will treat of this important subject from the points of view of the ratepayer, publicist, newspaper editor, legislator, and utility executive.

Will the Street Railway and the Bus Be Taxed Out of Business?

Why the gradual increase in the assessments imposed upon common carriers is paving the way for a new development in urban and interurban transportation.

By WALTER JACKSON

TEN years ago, when the writer diffidently suggested to electric railways that there was a place in their bosom for the motor bus, he was regarded as a bit balmy if not, indeed, in the pay of the automotive dragon.* At that time, the proverbial fingers of one hand would have sufficed to tot up the number of electric railways which were using the bus.

A couple of years later the tide turned. By the end of 1925, nearly 3,000 busses were at work; by the end of 1929, more than 10,000 busses were at work.

It is an exceptional trolley company, indeed, that has not at least one gas wagon on the premises. Even a railway which has no regular bus route can find occasional but important use for this vehicle, such as bridging a gap in track reconstruction or in chartered service.

It is not the purpose here to list the many valuable and (in some cases) unique applications of the motor bus that are responsible for

many installations, but rather to point out two factors that have accelerated this development.

The first of these factors is the salesmanship of the motor-bus makers; the second is the policy of expediency forced on the motor-bus operators.

THE old-time builder of street cars did business very differently from the modern bus manufacturer. Car builders were not in the habit of surveying a transportation system to determine how much it cost to run it with the existing types of equipment and how much could be saved with later designs that would also draw more business.

The electric railways did not buy cars from stock, but according to specifications that the car builder had to meet—or refrain from bidding. Some of the requirements might truly be justified by local conditions, but many times an expensive deviation from previous practice had no sound reason.

In the writer's electric railway youth he frequently heard car builders lament that not even the same

* See *Electric Railway Journal*, Feb. 28, April 3, April 24, May 29, July 3, and July 31, 1920.

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customer gave a repeat order that permitted extensive use of earlier jigs and templates.

Under the circumstances, almost every car order was as costly as a custom-made job usually is.

Standardization committees of the American Electric Railway Association met in solemn conclave with the equipment manufacturers to draw up norms for the industry. Neat drawings and clear descriptions were distributed far and wide. Alas, that many committee members should undo "the laws themselves had made!"

FOR the many years of earnest effort, standardization from within has made little progress toward lower costs in electric railway equipment.

The nearest we got to this was in the Birney single-truck safety car born of war-time needs. Once these needs became less pressing, the old game of individualism began all over again. Some said we needed two doors in front instead of one; others that the aisles should be narrower and the seats wider; others that the interior should be more reflective of automobile luxury than war-time sternness and so on. There was much to be said on both sides, but no general agreement to develop a series of cars fitted for different classes of service.

On the other hand, the bus maker produces a set of vehicles which incorporate all the latest ideas he has gained from the users. The latter do not dream of asking for the thousand and one petty dimensional and equipment changes that made standardization of rail cars impossible. The next

year the manufacturer may be offering quite a different bus, but it will still be a quantity-produced article.

This is one of the reasons why buyers can secure a given capacity of vehicle right out of stock and at a price which looks very low in comparison to the rail car. The buyer is not thinking at the time that the car *may* be useful twenty years instead of three to five.

WHEN we pass on to the motor bus maker, a different picture is revealed also in the manner of business solicitation.

The bus man did not wait for the transportation concern to announce that it was in the market.

Bold in the faith of a new religion, he sent his sales engineers to property after property to make surveys—at no cost to the railway, of course.

First they hunted down the districts which were without any service at all, counted the residents, figured the running times and possible schedules, then painted a pleasing picture of co-ordinated transportation.

The prospective client well knew that a sales engineer is an engineer armed with a rose-colored magnifying glass. However, as he was not spending any money for consulting services, he trusted to his own ability to whittle down the bus men's estimates to a sounder estimate of the number of vehicles required.

This practice of letting the manufacturer do the thinking has cost many electric railways a pretty penny. In one case, although the writer represented a manufacturer, he was still afflicted with a consultant's conscience. His boss was more than

Tax Relief May Be Found in the "Trackless Trolley"

"THE bus in small cities must work on such a narrow margin of profit that a few cents more in the gallon or the addition of seat-mile or gross earnings taxes can put it out of the profit column. Lucky the city where the bus ways belong to the power company, for then the latter is content to take a continuous loss if only its electric rates remain undisturbed. . . . The railway operator is casting around for some other substitute than the bus. Ere long his hopes may be pinned upon the trackless trolley because of its lower operating cost than gasoline and its freedom (until the tax gatherer hears about it) from either trolley or motor bus taxes."

grieved when the number of busses recommended was only one-third of the fleet size figured by the competitors.

The railway purchased on the "magnifying" basis aforementioned and has been nursing its deficits ever since. Ten busses would have been a blessing to the revenue, whereas thirty were a curse.

Regardless of unpleasant experiences like this, the use of motor busses by electric railways gave them a much needed insight into the capabilities and operating costs of these vehicles. Thereby they overcame their prejudice toward an exploitation which motor bus salesmen were afraid to mention at first, to wit, the replacement of existing rail routes.

It is this aspect of the bus that brings us to the matter of expediency. To use busses where the field is virgin is one problem; to use them where rail transport has held forth for many years is another problem.

UNTIL a decade or so ago the car trust certificate manner of purchasing rolling stock was little used among electric railways. The lack of standardization no doubt had something to do with this situation. We do not find much use of car trust certificates among the smaller companies before the arrival of a car (the Birney safety type) that could readily be used on many other properties if the first buyer could not meet his payments.

On the other hand, the bus manufacturer has been prepared to sell on a credit basis from the very first. He had less to fear than the car builder because his product could be whisked away on its own wheels to almost anyone else. An electric railway in good standing can secure as big a bus fleet as it wants without a penny down payment. In one instance, known to the writer, the purchase is made practically on the same basis as rent because the cost is

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spread over sixty monthly payments.

It is conceivable that a car builder would be willing to finance purchase of electric rolling stock on an even more liberal basis because of the greater durability of rail cars. That is not the whole story. Capital requirements are still greater in the domain of track construction and paving, which know naught of trust certificates or rental payments. There lies the real dilemma of the traction company.

In the course of time track will wear out, or good track may have to be replaced because of the many street widenings and other changes which the automobile has brought in its train. Here is a small railway suddenly expected to find several hundred thousand dollars for reconstruction. How is the money to be obtained from bankers who know that the revenue has been dwindling year after year?

That is one aspect of the difficulty. Another is that of the paving, bridge, and other obligations that were apparently fair enough in the days of horse cars and monopoly of transportation. It is immensely more burdensome to pay for monolithic paving than it was for cobblestones, and it is no joy at all to pay one-third or more of the cost of a new bridge that will encourage still further use of the automobile.

If the electric railway man found that he could spread his track and paving costs over the probable life of twenty years, he would be less eager to fly to the bus. He is a lucky street railway man, indeed, if his municipality will extend such credit for the paving as for like credit on

track materials: it just isn't being done.

IN those cases where the railway has been relieved of paving and bridge assessments, one is likely to find less abandonment of rail. The majority, unable to secure such concessions, have sought to escape Fate by means of the bus. Their hope was that it would be a long time, if ever, before motor bus operation was saddled with similar burdens.

This hope is turning to dust and ashes. When the railways began to turn to busses in a serious way, the ordinary gasoline tax was 1 or 2 cents per gallon. Now 4 cents is common, 5 cents has plenty of company, and at least two states (Florida and South Carolina) are charging 6 cents. In 1919, the only tax collectors were Colorado, North Dakota, and Oregon—and they were content with 1 cent. Now every state is in it from 2 cents up.

Bear in mind that this is a general tax that has no relation to the operator's use of the highway for gain from transportation. As time goes on, more and more states and cities impose special common carrier taxes. It is inevitable that when the community is deprived of one source of revenue; it will seek to recoup itself on the successor industry.

This would not matter if the growing burdens could be passed on to the rider. Unfortunately, this is not practicable. The majority of rail substitutions have been made in small cities where a high ratio of automobile ownership and use had denuded the old trolley of much of its business. It may have been anticipated

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that the arrival of spick and span busses in place of the Toonervilles would restore the old-time travel. This is an illusion. The public has forgotten how to wait for a public carrier. It is just as disagreeable to wait ten minutes for a bus as it was to wait ten minutes for a car. It is so much nicer to accept the autoist's invitation to hop on or even to roll your own. To raise the fare under such conditions is useless from a revenue standpoint.

Therefore, the bus in small cities must work on such a narrow margin of profit that a few cents more in the gallon or the addition of seat-mile or gross earnings taxes can put it out of the profit column. Lucky the city where the bus ways belong to the power company, for then the latter is content to take a continuous loss if only its electric rates remain undisturbed. There are many such cases that might be cited today and there

will undoubtedly be more in the future.

Now that expediency and lack of public co-operation in tax relief are coming home to roost, the railway operator is casting around for some other substitute than the bus. Ere long his hopes may be pinned upon the trackless trolley because of its lower operating cost than gasoline and its freedom (until the tax gatherer hears about it) from either trolley or motor bus taxes.

Great Britain has taken the lead in this development because of its higher gasoline costs and narrower, curved streets; but the recrudescence of the idea by the Electric Bond & Share Company on its properties at Salt Lake City and Knoxville suggests that the United States may also enter the trackless trolley game on a large scale as a rival to both bus and rail in city operation.

Believe or Not

(By our own Ripley)

THE average radio set in the home is turned on five hours a day.

TEN years is the life of the average electric railway trolley wire.

STATISTICS show that a person is safer on board a train than at home.

THE average bill to the householder for electric current in the home is \$29.20 a year.

THE electric iron continues to lead all other electric labor-saving appliances in widespread use.

CHICAGO has more telephones than all of France. New York has nearly as many as all of Great Britain.

THE average socket-power radio set consumes 60 watts, about equivalent to that used by an ordinary electric lamp.

WHILE searching among the smouldering ruins of a home in Childress, Texas, workmen opened the charred remains of an electric refrigerator and found in the porcelain cabinet two trays filled with ice cream and ice cubes.

What Happened at the White House

As summarized exclusively for PUBLIC UTILITIES FORTNIGHTLY by a group of public utility executives who informed President Hoover of their purpose to spend \$1,810,000,000 as their part of the program in maintaining the economic stability of the Nation during 1930.

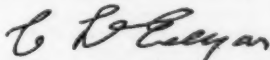
THE conference of public utility representatives with President Hoover produced a mutual exchange of information collected regarding business conditions in the country and prospects for 1930, not alone in respect of the utilities but in respect of business in general. We were able to assure the President that so far as the utilities were concerned the business outlook was eminently satisfactory and there would be increased expenditure for construction and maintenance rather than retrenchment.

Utilities are key industries, affecting and affected by conditions in other business. Our own surveys and what we learned at Washington showed that business is not crippled by the stock crash. It will be stimulated by the agreements to invest many billions of dollars in construction enterprises. The new year ought to continue on the high level of prosperity our country has enjoyed in recent years, with employment, wages, and living standards unimpaired. I think President Hoover has done a magnificent thing in enabling leaders of business to get such a survey of conditions. There can now be no reason for a psychological depression which would convert itself into a business depression.



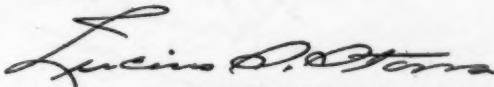
PRESIDENT, NATIONAL ELECTRIC LIGHT ASSOCIATION

THERE can be no doubt but what the result of the conference between President Hoover and the public utility executives in Washington will prove to the country at large that the utilities are in a prosperous condition and are intending to go ahead with their construction programmes to the same extent as if the Wall street upset had not occurred. It also, I think, strengthens the thought of each of the executives to find that those associated with him in the public utility business, but located in other parts of the country, look upon the whole matter in the same broad way as he did himself. In other words, it gave us all additional confidence.



PRESIDENT, THE EDISON ELECTRIC
ILLUMINATING COMPANY OF BOSTON

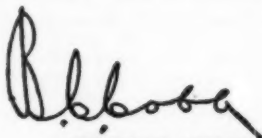
THERE is no question in the mind of anyone attending the President's Conference with utility executives of the unshaken confidence of this group of industrial leaders in the continued expansion of American industry; the fact that the electric power groups without an exception have planned expansion of their properties, with a total appropriation of over one billion dollars is a practical demonstration of this confidence.



EXECUTIVE CHAIRMAN, THE UNITED
RAILWAYS & ELECTRIC CO., BALTIMORE, MD.

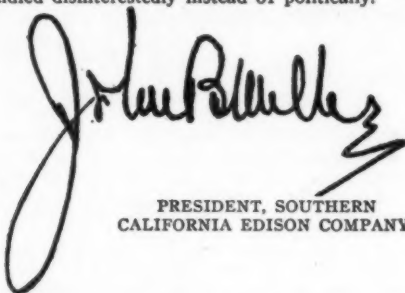
PUBLIC UTILITIES FORTNIGHTLY

THE meeting with President Hoover cannot be otherwise than helpful. It was constructive and illustrative of the desire on the part of industry in aiding the President in the great work he is doing. There is nothing fundamentally wrong with America, notwithstanding the fact that the country received a great shock because of the recent stock market decline. If we all keep pulling together, as we are undoubtedly doing, there can be only one answer—"success and prosperity."



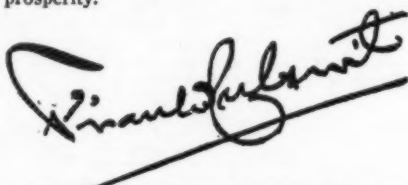
CHAIRMAN, ALLIED POWER
AND LIGHT CORPORATION

I WAS greatly impressed with two things in connection with President Hoover's method of meeting crises and emergencies by conferences tending to mobilize the brains and resources of the Nation. *First*: nothing could have averted a crash. It was bound to come sooner or later. How wise not to waste the brains and resources of the country on a futile effort to prevent a crash but to save them from the crisis that was bound to come. *Second*: how refreshing to see the situation handled disinterestedly instead of politically.



PRESIDENT, SOUTHERN
CALIFORNIA EDISON COMPANY

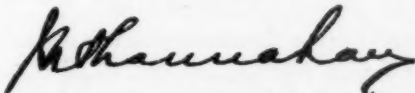
THE exchange of views between President Hoover and the public utility executives sounded a note of conservative optimism and impressed everyone present that the public utility business was on a sound basis and would go ahead, regardless of temporary financial vicissitudes, with a program of expansion never before equaled in any one year of this country's history. There was not one note of pessimism in the entire gathering. When the expressions of the public utility executives are put into action during 1930, as they will be, the public utilities will have contributed their large share to sound and continuing prosperity.



PRESIDENT, AMERICAN COMMONWEALTH
POWER CORPORATION

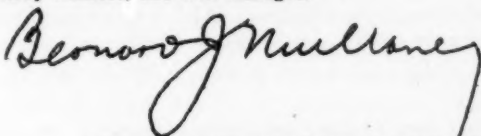
PUBLIC UTILITIES FORTNIGHTLY

SOME of the men who attended the meeting of the public utility executives with President Hoover on Wednesday, November 27th, were, prior to the meetings, frankly skeptical of the possible good to be accomplished by the series of business conferences the President had been holding. I think that practically everyone came away from the conferences convinced that the President was accomplishing much toward allaying the apprehension of the people as to the essential soundness of the present business outlook. There is no doubt whatever that the President deeply impressed the entire group of men.



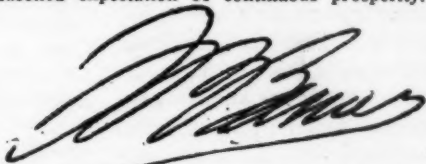
PRESIDENT, OMAHA AND COUNCIL BLUFFS
STREET RAILWAY CO.

PRESIDENT Hoover's conference with public utility executives emphasized the industry's responsiveness to a call for national service and emphasized its place in the economic structure of the country. The aggregate expenditure-forecast for construction and expansion by the electric light and power, manufactured and natural gas, and electric railway utilities for 1930 (approximately \$1,500,000,000) is considerably more than the similar expenditure contemplated by any other industry. The conference also developed another circumstance, and an indubitable deduction, of major economic significance. Thirty odd representatives of the leading contributors to the utility program each told something of his own company's plans *without an "if"* as to their ability to finance and execute the program. An industry that can take on a program of this magnitude as simply "all in the day's work" must be, on the whole, soundly organized, honestly financed, and well managed.



PRESIDENT, AMERICAN GAS ASSOCIATION

I WAS greatly impressed with the complete apposition of the detailed information already in the hands of the administration. Both comfort and inspiration were to be drawn from the unanimity with which all classes of public utilities predicted greater expenditures for 1930 than in 1929 for capital additions, and particularly from the very general reports that the sale of customer ownership stock had shown no diminution during or since the market upset. The impression gained from the meeting was strongly that the various expressions were not mere whistling to keep up courage, but were the statements of reasoned expectation of continuous prosperity.



PRESIDENT, LOUISVILLE RAILWAY COMPANY

The Propaganda Against the Utility Commissions

PUBLIC Service Commissioners, either elected or appointed to office, are both subjected at times to political attacks. In addition to the praise and criticism that emanates from hostile sources, the whole system of Commission regulation is subjected to the running fire not only of those critics who honestly seek to develop it on a high plane of efficiency but also—and more particularly—by those who are opposed to regulation on principle. How this latter group employ the grape-vine method of undermining public confidence in the Commissions and resort to general statements of unsupported opinion and hearsay is pointed out in this article.

By HENRY C. SPURR

IT is said that a good way for the enemies of a competent man to get rid of him is to start a story that "there is a growing dissatisfaction with his work" and that "the matter of his resignation is being considered." If the story is repeated often enough it may be effective. At least it will tend to discredit him.

Gossip is a dangerous and powerful weapon.

Certain statements are now being made to discredit the Public Service Commissions of the various states. These assertions are so similar, so standardized, so lacking in facts to support them, as to have all the earmarks of propaganda.

Take, for instance, the statement so frequently made that "there is widespread dissatisfaction with Commission regulation." There is scarcely a critic of the State Commissions who does not attempt to create atmosphere for what he has to say by some such assertion as that.

That this is regarded as important by the critics of regulation may be in-

ferred from the fact that in one book unfriendly to the Commissions, the idea is capitalized by an entire chapter devoted to current opinion about the Public Service Commissions as reflected "in newspaper editorials, memorials of civic and special interest groups, party platforms, public statutes, personal letters, speeches, and private conversation."

The authors give opinions on both sides of the question, but the melody or flavor which lingers, if we may so express it, is unfavorable to Commission regulation. The authors' conclusion from this "they say" testimony is as follows:

"The most general conclusion that can be drawn from this study is that there is widespread discontent with the practical workings of Public Service Commissions and that this is due, in part, to the special difficulties encountered in dealing with the high prices of the war and post-war period; in part, to the demand of the larger cities, that they be permitted to regulate their own utilities; in part to a feeling that Utility Commissions have not always been aggressive pro-

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tectors of the public interest, for a variety of reasons arising either from personnel or procedure; and finally to preference for public ownership as against public regulation. It is not possible to appraise the actual popular strength of the alternatives that have been developed: namely, abolition, reinvigoration, local home rule, and public ownership. It must be said, finally that, on the whole, the public attitude toward Utility Commissions has been critical rather than constructive, reflecting a feeling of uneasiness and distrust rather than a vigorous advocacy of an alternative policy."

This, the reader will observe, is bad for the Commissions any way one looks at it.

The authors take pains to state that they have not attempted any critical analysis of the conflicting views recorded. In other words, they do not vouch for the justice or soundness of any of the statements they repeat.

It may be pointed out, in passing, that no sanctity is added to hearsay testimony by the statement of one who repeats it that he has not analyzed it and does not vouch for its truth. Not much harm comes from spreading good reports, but great damage can be done by repeating evil reports which may be false. It does not help the fellow at whom such talk is aimed very much for the narrator to add that he does not know whether the story is true or false. A gossip, for example, does not convert himself into a public benefactor by a statement that he does not vouch for the truth of a harmful tale he repeats.

It will be noted that the authors of the chapter on public opinion al-

ready referred to state as their "conclusion" that there is widespread discontent with the practical working of Public Service Commissions; and that they have also shown how they came to arrive at that conclusion. This is proper because it gives the reader some basis for checking up on its soundness. In the majority of cases, however, the statement that there is widespread dissatisfaction with Commission regulation is made to appear as a statement of fact. It is, of course, always the statement of a conclusion. It could not be testified to as a fact by a witness in any court of law unless the lawyers were asleep.

A counter statement might be made that outside of disappointed litigants here and there, and a small group of persons opposed to regulation on principle, there is little dissatisfaction with Commission regulation; or the statement might be made that belief in the public benefits resulting from regulation of public utilities is widespread. These would also be statements of conclusions, but there are many who think they would be much nearer the truth than the statement that there is widespread dissatisfaction with Commission regulation.

The trouble with statements like that lies in the use of the word "widespread." Just what does that mean? There is, of course, dissatisfaction with Commission regulation; and this dissatisfaction has been at times quite pronounced. It has been strong enough in spots and places to result in political attacks against the Commissions. But that does not mean that the dissatisfaction against Commission regulation is widespread if, by widespread dissatisfaction it is

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meant that dissatisfaction has spread over any great portion of the public. A very large part of the public probably does not even know that public service regulation exists.

IT is easy to overestimate the strength of public sentiment one way or the other. A man running for public office, no matter how slim his chances of election may be, somehow comes to the conclusion before the campaign is over that there is a tremendous popular sentiment in his favor. He often finds when the votes have been counted that he was mistaken. There is no way, however, to check up on statements that there is widespread dissatisfaction with Commission regulation.

Statements that there is widespread dissatisfaction with Commission regulation are probably made in the belief or for the purpose of creating the impression that there must, therefore, be something wrong with the Commissions. But it does not follow from this that there is anything wrong. There was once very pronounced dissatisfaction with Galileo because he said the earth revolved instead of standing still as everybody in his time believed. Galileo, however, was right. The dissatisfied ones were wrong. The opinion against Galileo was widespread. That did not prove that there was anything the matter with him.

So, if we should concede, for the sake of the argument, that there is widespread dissatisfaction with Commission regulation, it would not mean that the unfavorable opinions were justified. Thus far, whenever the standardized charges or complaints

against Commission regulation have been checked up by anything like a real investigation, the Commissions have come out with flying colors.

Quite recently, the Board of Railroad Commissioners of South Dakota came under the hostile fire of the Governor, who recommended that the Commission be abolished. One of the charges made by the Governor was that the purpose for which the Commission was originally created was to prevent the charging of exorbitant rates and that this had entirely been lost sight of.

This will be at once recognized as one of the standardized charges against Commission regulation. It crops out in various forms but the one in which the Governor of South Dakota stated it is perhaps the most popular of the various guises in which it is presented.

The Governor's charges were investigated by a bi-partisan committee whose report was unanimous to the effect that they were unfounded. As to the charge that the Commission had lost sight of the purpose for which it was created—to prevent charging of exorbitant rates—the committee said:

"This is a serious charge. The legislature, in Chapter 110 of the Sessions Laws of 1897, did empower the Board to regulate railroad rates, and while not specifically stated in the statute, it has always been assumed that among the most important of the various duties of the Board has been that to prevent the charging of unreasonable, exorbitant, or prejudicial rates.

"In view of the seriousness of this charge, we have given this feature of the investigation most careful attention. In connection with the investi-

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gation, the records, reports, and files of the Board have been made accessible to us and in addition, special studies have been prepared and submitted as exhibits indicating the scope of the Board's activities in the matter of investigation, control, and prevention of exorbitant rates. Furthermore, the annual reports filed by the Board with the Governor and with this legislature contain a brief summary of the activities of the Board in this connection.

"It is impossible, within the scope of this report, to outline in detail the results of our investigation of this matter, but the detailed record and the exhibits filed show most clearly that the Governor has undoubtedly been seriously misinformed on this point. We find that the Board is now, and has for many years been exceedingly active and aggressive in the matter of the investigation, condemnation, and correction of exorbitant rates. In fact, the record shows that the carriers complain most bitterly of what they term the 'unwarranted activities' of the Board along this line. In many instances the Board assumes the initiative and itself initiates investigations of intrastate rates or files complaints with the Interstate Commerce Commission respecting interstate rates without awaiting the filing of formal complaints by shippers or receivers. This is done when its informal investigations indicate the need of corrective measures.

"We have looked closely into the work done by the Board in these cases, examining the exhibits, the briefs filed, and their testimony, and are satisfied that instead of being criticized for lack of attention to the important matter of securing reasonable rates, the Board and its organization should be strongly commended for the work done by it.

"In summing up our findings regarding this feature of the Governor's message, we are constrained to

find that the charge has no foundation in fact, but that on the other hand the Board has in a most laudable manner performed its duties with respect to the control and correction of unlawful intrastate rates and also with respect to the matter of actively challenging unlawful interstate rates and in securing their correction."

No doubt there was considerable dissatisfaction in South Dakota with the Commission or else the Governor would not have thought it worth while to make a political issue of it. A legislative investigation showed that there was no basis for this dissatisfaction. Such statements, however, will continue to be made, probably in the hope that those to whose attention they come will believe that Commission regulation is ineffective on the theory that where there is smoke there must be fire. But while smoke is accounted for by fire, fluent conversation often rises no higher than the level of gossip. Talk does not necessarily signify truth.

SUPPOSE we examine one of the standardized arguments advanced to show the alleged ineffectiveness of Commission regulation. It is said:

1. The pay for Commissioners is not sufficient to attract men of the highest ability.
2. They usually have insufficient appropriations, causing undermanned and incompetent staffs.

Now the salaries of Public Service and Railroad Commissioners run all the way from \$15,000 a year, the amount paid in New York state, to \$2,250 and \$2,000 a year, the amounts paid respectively in Mississippi and Vermont. In Vermont, the Chairman gets \$4,200. New Jersey

The Source of Most Criticism of
Commission Regulation:

"MOST of the complaints against Commission regulation, indeed, if analyzed, will be found to amount to nothing more than a difference of opinion as to the reasonableness of rates. But the fact that rates may not be as low as an opponent of regulation thinks they ought to be does not mean that the public has not been protected, through the exercise by the State Commissions, of their rate-making powers."

pays its Commissioners \$12,000 a year. Pennsylvania, \$10,000; California, \$8,000; District of Columbia, \$7,500; Massachusetts, \$7,000 with an extra \$1,000 for its Chairman; Illinois, \$7,000; Indiana, Virginia, Ohio, Texas, Washington, and West Virginia, \$6,000; Wisconsin and Maryland, \$5,000; Connecticut, \$5,000, with \$6,000 to its Chairman; North Carolina, \$5,000, with \$500 extra for its Chairman.

If you like to consider averages, you will find that the average pay of Public Service Commissioners throughout the country is a little over \$5,000 a year.

Most of us will agree that the average salary paid to Public Service Commissioners is not as high as it should be; but the purpose of the statement that the amount paid is not sufficient to attract men of the highest ability is not only to show that the salaries paid do not attract men of the highest ability but to show that they do not attract men of sufficient ability to insure effective regulation.

There have been many men of exceptional ability who have served the state of New York as executives for

less than \$15,000 a year, and there would be many men of exceptional ability today who would do so even if the salary were \$10,000 a year. They would serve at great financial sacrifice. Many men are attracted to official positions by motives other than monetary. There are many highly competent and efficient men working in all sorts of positions for compensation which might be said not to be high enough to attract men of the highest ability. The use of the monetary yardstick to measure ability might be very embarrassing to many persons, perhaps even to some who are attacking the Commissions on that ground.

WITHOUT any purpose of making invidious comparisons it can truthfully be said that measured by the monetary standard the Wisconsin Commission would not stand very high; but that measured by what it has contributed to the solution of the problems of regulation and measured by what it has actually done for the public welfare, the Wisconsin Commission stands and has always stood in the first rank of our regulatory

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bodies, and that it has always had a personnel of high ability. No one studying the opinions of that Commission from 1907 down to the present date would have to apologize for it on the ground that the \$5,000 a year paid to its Commissioners is not sufficient to attract men of the highest ability.

The same disposition may be made of the argument that Commission staffs are incompetent because of inadequate legislative appropriations. These staffs may or may not be incompetent but the truth as to that cannot be tested by payrolls. Happily for the country, not all men are wholly mercenary. Many of the Commissions have small and probably underpaid staffs, but those staffs are nevertheless competent. Inadequate appropriations may have made it difficult to keep these staffs together but still the Commissions have been able to maintain nonpolitical, efficient staffs, well able to do the work which they are called upon to perform. Speaking of this, Chairman Gettle of the Wisconsin Commission once said:

"I have no data available as to State Commissions generally but in my own state many of the Commission's expert staff have been with it for from ten to twenty years. It is a matter of some pride to us that the Commission usually does not know the politics of the men whom it employs. After many years of association we have learned that some employees hold political views very much opposed to those of the Commissioners but this does not lessen their value or endanger their positions. I think it is safe to say that in the more than twenty-three years since the Commission was created no member of its engineering, account-

ing, or traffic staff has ever been dismissed for political reasons.

"The greatest difficulty which we have in keeping up an expert staff is the difficulty of keeping men at the salaries which the state will pay. By holding men in key positions, by taking advantage of a real devotion to state work in some cases, and by putting younger men through a careful course of training, we have kept up the level of our expert staff to a high point but it would have been utterly impossible if they had not been free from political interference."

It is apparent that a blanket charge of lack of ability cannot be based on the size of the pay envelope or check. Suppose we pursue this inquiry a little further.

LET us assume that a group of men get together and start an attack upon our colleges. It would be easy enough for them to say "Our colleges are breaking down. There is widespread dissatisfaction with them. They do not educate the students. The pay of our college professors is not sufficient to attract men of the highest ability."

Now, how about the pay of college professors? How does it average up with that of our Public Service Commissioners? If it is not as high as that of our Public Service Commissioners are we to conclude that college professors have less ability? Certainly not. If we are really interested in a man's ability we must examine the product of his brain or hand or both. Salary or financial reward may be circumstantial evidence but it is not conclusive. Neither is it of very much value. Sneering at a man because of his salary is the worst kind of snobbery.

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OUR Public Service Commissions are essentially administrative and fact-finding bodies. There is nothing in the evidence of the reports of their decisions to indicate that they have not performed that duty both faithfully and efficiently. On the contrary, there is plenty of evidence, notwithstanding any question as to the adequacy of their compensation, that they have done an exceptionally able piece of work for the public.

The competency of the members of the South Dakota Commission was one of the questions reported on by the legislative investigating committee. The committee said:

"Our investigation further indicates conclusively that the present personnel of the Railroad Commission and its staff are well qualified, and in fact exceptionally so, to handle the many duties devolving upon that organization."

The salary of the Commissioners is \$4,500—less than the average for Commissioners throughout the country.

HERE is another of the standardized assertions respecting the alleged failure of Commission regulation:

"As a protection to the consuming public we have public regulation accomplished usually through the agency of Public Service Commissions.

"Experience, however, has brought us to the realization that we are not protected by the State Public Service Commission."

This quotation is taken from a series of articles running in a prominent newspaper. It belongs to the same family as the charge made by the Governor of South Dakota with reference to the failure of the South Dakota Commission to protect the public from exorbitant rates, the falsity of which was quickly exposed by legislative investigation.

The author of the statement that the public is not protected by Public Service Commissions must be held to account for the statement as written and printed. Mental reservations cannot be considered. The statement is not ambiguous. It cannot, as lawyers say, be explained by parol evidence. It must be assumed that the author means what he says.

Judged by that standard he shows a surprising unfamiliarity with Commission regulation. The slightest investigation would demonstrate the absurdity of his statement.

PUBLIC Service Commissions generally have power of supervision and control of public utilities, and they exercise it.

They have power to enter upon the premises for the purposes of inspection and they exercise that power.

They have power to examine em-



Q "THE statement that there is widespread dissatisfaction with Commission regulation is made to appear as a statement of FACT. It is, of course, always the statement of a CONCLUSION. It could not be testified to as a fact by a witness in any court of law."

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employees of public utilities and public utility records and they exercise that power.

They have power to prevent unreasonable rates, discrimination, both local and personal, and they exercise that power.

They have power to fix rates and they exercise that power.

They have power to value property for the purpose of determining the reasonableness of rates and they exercise that power.

They have power to establish joint rates and they exercise that power.

They have power to compel filing and posting of rate schedules and they exercise that power.

They have power to prescribe the form of schedules, reports, and to require uniform accounts and they exercise that power.

They have power to regulate service and to prescribe standards of safety and they exercise that power.

Many of the Commissions have control over security issues and they exercise that power.

Where full Commission regulation exists, utilities cannot go into business without Commission consent and it has even been held that they cannot go out of business without Commission consent. They must go to the Commission before they can issue their securities. They must keep their books as the Commission directs. Their rates and service must be such as are prescribed by the Commission.

That is certainly some protection to the rate-paying public.

TAKE as simple a matter as a dispute between a utility company and one of its customers over a bill.

The customer maintains that it is not just and refuses to pay. The utility discontinues service. The Commission invariably orders the service to be resumed and refers the companies to the courts to establish the justice of their claims.

That is some protection to the consuming public.

Public utility companies have in many instances been ordered to extend service to consumers where they would not have done so had they not been forced into such action by the Commission.

That is some protection to the public.

Utilities have been refused permission by Commissions to abandon service in many cases in which they would have abandoned it if it had not been for Commission regulation.

That is some protection to the public.

The Commissions have stopped many discriminatory practices both as to rates and service.

That is some protection to the public.

Commissions have ordered physical connections between railway lines and telephone lines where the public interest seems to require it.

That is some protection to the public.

Commissions have ordered reparation for overcharges and for inadequate service.

That is some protection to the public.

Through Commission regulation both by control over securities and otherwise, the public is no longer in danger of being overcharged to pay

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Q "THUS far, whenever the standardized charges or complaints against Commission regulation have been checked up by anything like a real investigation, the Commissions have come out with flying colors."



dividends on so called watered stock.

That, too, is some protection to the public.

If the author of the statement that the public is not protected by public service regulation were cross-examined, he would probably first back away a little by saying that what he meant was that the public is not *adequately* protected. If he were still further cross-questioned he would probably attempt to cover by saying that the public is not *adequately* protected because rates have not been reduced by the Commissions as much as they should have been. If driven into a corner by being asked for the facts upon which that conclusion is based the best he could do would be to assert that the Supreme Court, by holding that the states have not the power to confiscate the property of public utilities, has prevented the Commission from fixing rates as low as they otherwise could. Most of the complaints against Commission regulation, indeed, if analyzed, will be found to amount to nothing more than a difference of opinion as to the reasonableness of rates.

BUT the fact that rates may not be as low as an opponent of regulation thinks they ought to be, does not mean that the public has not been protected through the exercise, by the Commissions, of their rate-making powers.

In an article on "How California

Regulates Its Public Utilities,"¹ by Henry A. Frazier, Recorder of the California Railroad Commission, the author states:

"That regulation of public utilities pays large dividends to the general public is apparent from a comparison of the figures showing the cost of such regulation and the amount of reductions in rates ordered or of increases denied as shown by the annual report of the Railroad Commission recently compiled."

After stating that a comparative estimate showed that rate reductions for the entire fiscal year amounted to a sum of at least "\$3,500,000," the author continues:

"It is apparent, therefore, that it has cost approximately \$1 to every \$1,000 of their revenue within the state, to regulate the utilities in California. On the other hand, for every dollar expended by the Railroad Commission in regulating the utilities, there has been returned to the ratepayers \$7 in reduced utility charges—irrespective of any savings accruing because of the refusal of the Commission to sanction requested increases in rates or the part played by the Commission in winning substantial reductions in interstate rates."

Enormous savings of the same nature could be and have been shown by other State Commissions. Can it be said in the face of such evidence as this that the public is not protected by Commission regulation?

¹ PUBLIC UTILITIES FORTNIGHTLY, January 24, 1929, pages 78, 81.

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Incidentally, it must not be forgotten that there is something more to Commission regulation, as already indicated, than the fixing of rates.

IF anyone is really interested in ascertaining facts about Commission regulation, he ought to read Mr. Frazier's article. One of the minor matters he mentioned in that article was that as a result of the inspections of the Commission of overhead electric line construction, 350,000 potential cases of accidents to utility operators or the general public were corrected upon orders of the Commission.

That is a little protection to the public, is it not?

Part of the work of the Commissions consists in the adjustment of informal complaints without expense to the consumers who are aggrieved. The Pennsylvania Commission, for example, requires public utility companies to register complaints in a special book kept for that purpose and to show what disposition is made of them. Consumers are encouraged to exhaust their remedy with the company before applying to the Commission for redress. One can be quite certain that the companies will give more careful consideration to complaints which may ultimately reach the Commission than they would if there were no Commission. Many of the complaints are adjusted in that way but many of them are called to the attention of the Commission. In 1928, for example, there were 1,193

informal complaints against electric companies brought to the attention of that Commission, most of which, however, were adjusted without formal action by the Commission.

Surely that is some protection to the public.

THE supervisory work in connection with the elimination of dangerous grade crossings is an important feature of Commission regulation. In Pennsylvania, \$1,000,000 a month is spent for the elimination of these crossings. Since the organization of the Commission, \$180,000,000 has been spent for this purpose under the direction of the engineering bureau of the Commission.

That also amounts to some protection to the public, does it not?

To analyze the various conclusions upon which many of the critics of public service regulation base their major conclusion that it does not protect the public, would unduly extend this article.

NOBODY pretends that Commission regulation is above criticism, but in considering broad assertions that the Commissions and their staffs are incompetent, and that the public is unprotected and, therefore, unbefitted, it is well to notice whether the authors set forth the sources of their information or belief; whether their conclusions rest upon stated facts, or upon hearsay; or whether or not they are the result of the mere pyramiding of conclusions.

“WE must learn how to regulate adequately our public service in private hands, or there will be no alternative but the Government ownership of such services.”

—OWEN D. YOUNG



PUBLIC UTILITIES FORTNIGHTLY
MUNSEY BUILDING ÷ WASHINGTON, D. C.

January 9, 1930.

SUBJECT: Telephoning to ships at sea:

Dear Sir:

A score or more of men sat around a table in the office of the American Telephone & Telegraph Company in New York a short time ago to be in on the opening of a two-way telephone service with ships at sea.

When everything was ready, Walter S. Gifford, president of the company, spoke into a transmitter saying:

"Get me Commodore H. A. Cunningham aboard the Leviathan at sea."

Each of the men around the table held a receiver against his ear. The circuit was completed from New York by land wire to the radio sending station, Deal Beach, New Jersey, across 200 miles of water to the ship and back again by way of the receiving station at Forked River, New Jersey.

The response was clear and strong. "This is Commodore Cunningham aboard the Leviathan."

The new circuit worked. Conversation was maintained for twenty minutes.

It was only fifty-three years ago that Alexander Graham Bell, with his experimental instrument, wired from his laboratory to the basement of the building, called down to his assistant, Thomas A. Watson:

"Mr. Watson, come here. I want you."

Mr. Watson, thrilled and flushed with excitement, bounded up three flights of stairs.

"I can hear you! I can hear the words!" he shouted.

What a difference between then and now. Bell's invention, even when perfected so that the human voice could be heard, and words distinguished, was regarded as merely a toy. It was said that it would never be of any practical use. Bell, himself, was called a ventriloquist and impostor. Across the Atlantic the telephone was regarded as a great American humbug.

Instead of a toy, however, the telephone has developed into a great public utility, its rates and service subject to regulation by the state. This means that its usefulness has become so great as to be of vital interest to the public. It is a service dedicated to the people; and it is a fine service. It has helped the Nation grow and prosper.

Today no one reading the account of this new achievement of talking with ships at sea would regard it as a humbug. Neither will the people be likely to give the new service from shore to sea more than casual attention. The public is no longer much astonished at great accomplishments. It takes them as a matter of course. It expects them from the telephone industry.

Nevertheless, this new service is a great achievement. For it, inventors and forward-looking business men who have made it possible should be thanked.

Very truly yours,

Henry C. Spurr

HCS:S

What Others Think

The "Watered Stock" Issue of a Utility Enters the Political Arena

IN an article in *The Forum*, Franklin D. Roosevelt, Governor of New York state, declares that "the real milk in the electric cocoanut" is the question whether the people of the country want to pay rates on what may be watered stock or limit the company's return to prudent investment. He says:

"The real 'milk in the electric cocoanut,' is, therefore, the question as to which view the people of this country want to take. In the one case they will be willing to accept the obvious hope of the electric utility companies to earn an adequate return on all of the pyramiding of stocks which has gone on through the mergers and consolidations, and thereby treat public utility companies practically as if they were wholly private enterprises; accepting this with eyes open and realizing that the householders and manufacturers and farmers of the Nation are the people who are paying these great profits. On the other hand, the public can insist on going back to the principles which have stood for three hundred years, differentiating sharply between a public utility and a private business, insisting that the rate of return shall be based on the prudent investment theory and on the right of the consuming public to get the lion's share resulting from improvements made in management and in modern science."

THE people are, of course, faced with no such problem. No one expects utility companies to be treated on the same basis as private industry. The utilities have not been allowed to earn a return on inflated stock issues in New York state or in any other state under full public service regulation for a quarter of a century, and there is no danger that they will be allowed to do so now. If the stock of holding companies is watered—an affirmation for which no proof is offered—that would not mean that ratepayers of operating companies could be required to pay divi-

dends on such stock issues. Rates are fixed by the value of the operating company's property. They are permitted to earn a return on no more than that, no matter how much water there may be in the capital stock.

Governor Roosevelt has rather a novel idea of what the prudent investment theory means. He says:

"Let me cite an example. Assume that a company develops a water power at a cost (including operating capital) of \$1,000,000, consisting of \$700,000 of bonds and \$300,000 of stock. Under the prudent investment theory the owners of the capital stock might properly get a return on their investment of 8 per cent a year, or \$24,000. This would come to them after a proper amount had been set aside from earnings to create a depreciation fund and a small surplus and to pay the interest on the bonds. Under the prudent investment theory the common stockholders would have enough in the depreciation fund to rebuild the plant when it became obsolete or outworn, and they would have practically permanent assurance that their principal and interest were secure."

In other words, Governor Roosevelt seems to think that the prudent investment theory is that the return should be limited to a reasonable percentage of the amount actually paid for stock. If the property cost \$1,000,000 the return would not be on \$1,000,000 but only on the stockholders' equity in the plant. This is not the accepted meaning of the prudent investment theory.

GOVERNOR Roosevelt carries the impression that the original intent in enacting the laws creating the Commissions was that the owners of utility property should be limited to a reasonable return on their investment and by investment, of course, he means on their equity in the property.

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If that had been the intent of the law makers, it would have been easy to have stated it. No evidence that such was their intent is to be found in the statutes. On the contrary the statutes disprove such an intent. New York laws, for example, state certain elements which the Commission is required to take into account in determining the reasonableness of rates. In regard to the rates of carriers, for example, the Commission is required to give due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service. The same provision is made with reference to telephone rates. The provision in regard to rates for gas and electricity was that the Commission shall give due regard, among other things, to a reasonable average return upon capital actually expended.

THE Commission is not required, even in the case of rates for gas and electricity, to limit the return upon capital actually expended. If such had been the intention of the legislature it is reasonable to believe that it would have provided for it. The legislature was probably familiar with the law of the land and knew

that such legislation would be futile.

The fact is that at the time these laws were enacted the people pinned their faith on valuation of utility property. It was the general impression that utilities were making enormous profits on watered stock just as it seems to be the Governor's impression that that is what they expect to do by overcapitalization of holding companies. So the legislature made provision for valuation.

Valuation is a protective weapon which has not been employed by the utility companies alone. It is often used against the companies by the ratepayers. Recently the railway companies of the city of Washington asked for an increase of fare. Their case was thrown out by the Commission on the ground that they had not proved the value of their property.

Although utility companies have the right to a return on the value of their property and although the ratepayers have the right to insist that the return be no more than the value of the property warrants, valuation is insisted on in only a small portion of the rate cases by either party to the controversy.

THE REAL MEANING OF THE POWER PROBLEM.
By Franklin D. Roosevelt, Governor of New York. *The Forum*, December, 1929.

The "Customer Cost" as a Factor in Establishing a Scientific Rate Schedule

THE gas industry has met with considerable opposition from the public in the industry's effort to establish scientific rate schedules. This is largely because gas companies operated under discriminatory schedules for so many years that these rates became the fashion. In addition to that, the old flat rates were easy to understand. The public was adverse to proposed changes. Nevertheless the gas business, which has become highly competitive, could not operate readily under the old form of discriminatory schedules.

One of the problems in connection with gas rate making is to provide for

the cost imposed upon the company by customers irrespective of any consumption of gas. The 1929 Rate Structure Committee of the American Gas Association—to quote its own words—

" . . . has gone on record on many occasions as favoring rates for general use which contain a service or customer cost, in some form. This may be stated in several ways. One which has met with very great favor is that in which a moderate customer cost is included in the first block of the general rate, such as: "First 200 cu. ft. or less per month—\$1. An increasing number of companies have installed general rates in which the customer charge is stated as a distinct and definite charge, or as a 'readiness to serve' charge, whether

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the balance of the rate is in a block form, or in the three-part form."

The Committee urges gas companies to make careful rate studies. Upon this point the Committee says:

"While we urge the advisability of a rate study by each company, and that this study be revised and brought down to date frequently in order that each company may be fully apprised of the actual cost of the various elements entering into its gas service, we do not suggest that the mathe-

matical results obtained by such a study should be used as an inflexible guide to the forms of rates which should be charged. The computations obtained from a cost analysis will be most helpful in arriving at an informed judgment and in checking the reasonableness and propriety of any proposed rate, but the factors of business judgment and commercial expediency will continue to be potent in all determinations of proposed forms."

REPORT OF RATE STRUCTURE COMMITTEE;
American Gas Association, Incorporated.
October, 1929.

The Effect of State Regulation on Capital Inflation of Operating Companies

THE alleged shortcomings of Commission regulation of utilities is often set forth by utility opponents. It will be interesting, therefore, to glance at the other side of the picture as painted by a utility man. According to William J. Hagenah of the Byllesby Engineering and Management Corporation:

"The benefits obtained by the public from the electric utility industry under state regulation are three in number; namely, first, it has secured at all times adequate and efficient service; secondly, electric rates have been maintained on a reasonable basis as defined by law; and thirdly, there has been no exploitation of the securities of the operating companies. Not one of these statements can be successfully contradicted. Adverse comments on these subjects in the public press are unwarranted by the facts."

Adequacy of service is a matter seldom considered by critics of utility companies. Upon this subject Mr. Hagenah says:

"That the service of the electric utilities has kept pace with inventions and scientific progress and that it has been made available to all classes of consumers, no well informed person will deny. Certainly there is no complaint from those who use the service. The electrification of industry, the almost universal use of electricity for lighting and for numerous conveniences in the home, and the extension of electric service to the farms are matters of common knowledge. Widespread agricultural electrification is the new goal toward which utility and Commission efforts are now being bent. Not even the critics of the utili-

ties will claim that this first duty to the public has not been amply and efficiently met, and yet it was largely out of service complaints that the movement for regulation crystallized in New York and Wisconsin twenty-two years ago."

THE electric industry is the one on which fire is directed at present. One of the allegations is that its rates are too high. Singularly enough, this is one of the few industries which has been constantly decreasing its rates in spite of the increased cost of every item entering into construction and operation. Upon this point Mr. Hagenah says:

"In both the domestic and industrial services rates have been constantly reduced. During the last fifteen years, which include the world war and post-war deflation, practically every item of cost entering into the construction and operation of public utilities has greatly increased. Nevertheless, electric rates have tended downward. Electric service is one of the few items entering into the family budget that can be had at substantially lower cost than before the war and regulation by the State Commissions has been a major force in contributing to this condition. Every utility executive and every customer for electric service knows this to be true, and it is such information that goes far to establish public confidence in the utilities and in the regulatory authorities. . . .

"Reductions in domestic and power rates have been made possible by the construction of vastly larger and more efficient units of production, by the interconnection of utility properties, and by the improved methods of operation and efficiency of management brought about by the develop-

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ment of the holding company and the management company. These savings, whether resulting from inventions, technical improvements or efficiency in management, have been transmitted to the public through the downward revision of rates. The profits have not been retained by the utilities for at no time have the Commissions permitted rates that yielded a higher return than is necessary to attract the capital needed to keep the industry abreast of growing public needs. The influence of the State Commissions has always been present, both in formal and informal negotiations, carrying out the letter and the spirit of public regulation."

Mr. Hagenah declares that there is no inflation of public utility security issues. He says:

"There is no overcapitalization in the

electric utility field. Effective state regulation makes capital inflation among the operating companies impossible. There can be no capital exploitation in these companies so long as the states prescribe correct accounting systems, supervise the issuance of securities, and fix rates calculated to yield no more than a reasonable return on the fair value of the properties. This necessarily compels conservatism for utility companies as is apparent from a comparison with private industries which capitalize their unrestricted earning power. Nowhere is there so close a relationship between the fair value of the property assets and the outstanding securities as obtains in the utility industry under commission regulation."

Address by WILLIAM J. HAGENAH AT THE FORTY-FIFTH ANNUAL MEETING OF THE ASSOCIATION OF EDISON ILLUMINATING COMPANIES, Frontenac, Quebec. 1929.

Conflicting Theories in Making Valuations for Rate-Making Purposes

THE problems in connection with the valuation of public utility property for rate-making purposes, together with the conflicting opinions with reference to the subject, are ably and thoroughly presented in Part I of an article on "Railroad Valuation" by Lewis C. Sorrell, Professor of Transportation, University of Chicago, in the *Traffic World*. In the space of a comparatively short article the author has painted the picture with accuracy and considerable detail.

Take, for example, the controversy over the reproduction cost theory. Professor Sorrell says:

"The reproduction cost theory receives much support from the inequities of the changing price level. Suppose an investor in railroads invested \$1,000 in 1900, expecting a 5 per cent return, or \$50 a year. The price level falls so that, in 1929, \$1 can buy, perhaps, only what 30 cents could buy in 1900. Then it is obvious that, in terms of purchasing power, the original investment of \$1,000 has shrunk to something like \$300 and the income to \$15—in terms, of course, of the 1900 dollar. If, now, the valuation of that investment is taken at original cost and a fair return predicated on that sum, the investor has sustained a heavy loss. But, if that investment is valued at the price level prevailing in 1929 and

a fair return allowed on it, the investor is not penalized. For, now, assuming that the physical plant has been properly maintained, the property represented in 1900 by \$1,000 is represented by \$3,333, and a return of \$50 of the 1900 vintage becomes \$165 of the 1929 sort. Their purchasing power, however, remains the same as that of 1900. Reproduction cost at current price levels then tends to preserve the investment of the investor while valuation on the original cost basis makes the investor a speculator in the value of money.

"This is undeniable, but original cost devotees are ready with a goal-line defense.

"(1) They contend that use of the reproduction cost at current price levels would greatly increase stock market speculation. Who would benefit from fair returns based on current price levels? Not the bondholders, for they invested a sum certain in money and contracted to receive in the future the same sum. In many cases, not the preferred stockholders, especially where their stocks are limited in returns and are callable at prescribed figures. The increased returns, therefore, would accrue largely to the common stockholders. In the case of a rising price level the common stockholders under reproduction cost would gain not only the returns on their own equity increased by the rising prices, but also the increased returns on that part of the investment represented by the bonds. Conversely, on a falling price level, assuming an adjustment of reproduction cost figures downward, the common stockhold-

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ers would chiefly bear the brunt, unless the decline went so far as to impair the equity behind the bonds as well.

"(2) It is alleged that reproduction cost at current price levels is too difficult to administer. It is not a stable rate base, but one that must constantly shift with changes in the general level of prices and also with changes in the cost of reproducing railway properties. These two changes may move in the same direction at the same rate, or they may not. Changes in the cost of reproducing railway properties may be due not only to price changes, but also to changes in technical methods. The latter may offset, in whole or in part, the former. Where little railway construction is taking place, as has been true in the United States for fifteen years or more, it may be difficult to get trustworthy data concerning the current cost of reproducing the immovable part of the railway plant. Furthermore, questions may be raised concerning the adequacy of any of the general cost-of-living indexes as methods of raising the previous railway values to allow for price changes.

"(3) That protection of investors against the changes in the value of money does not necessitate reproduction at current price level valuations, but simply the application of an index of purchasing power applied to original cost. Furthermore, if it is desirable to consider this aspect of the case in dealing with the investors in public utilities, the increase in the value should be applied only to the stockholders' equity and should not include the property behind contractual obligations, such as bonds. And, again, that due recognition of this element might perhaps better be taken up in the fair rate of return allowed than in the valuation base itself; and that protection of investors against changes in the purchasing power of money really belongs to some scheme for stabilizing the dollar rather than in the methods of public utility regulation.

"Reproduction cost sponsors, especially those upholding current price level appraisals, bring another indictment against original cost. They allege that it results in ineffective utilization of a nation's resources. Given a certain freight rate level predicated on cost of transportation, into which returns on investment have entered, and a certain territorial development results. The cost of transportation limits the markets that coal, wheat, flour, and numerous other products, produced in given areas, can reach. With a rising price level the prices of these commodities tend to rise and they can bear higher freight rates. But, with investment held down to original cost, the tendency will be for freight rates to rise more slowly, and this will encourage a movement of goods that should not be allowed to take place. Similarly, when

the price level falls, if the railroad investment is maintained at the higher price level, freight rates will thereby be retarded in their decline and traffic that ought to flow will not be allowed to do so. In the one case transportation that is not economical is encouraged; in the other, transportation that is economical is discouraged.

"To this contention opponents reply that it exaggerates the effect of railroad investment cost on commercial development. It may be true that the lag in freight rates behind general price level changes may increase or retard certain desirable traffic, but it is argued that the return on the investment is a comparatively small factor in this result. Thus, since the operating ratio between operating revenues and operating expenses is in the neighborhood of 75 per cent, the prices of materials and wages of labor are far more potent than returns to investors, and prices of materials and wages tend to change with the changes in the general price levels. The effect of slowly changing railway investments on the level of freight rates must, therefore, be limited to some part of the 25 per cent remaining from revenues after accounting for operating expenses, and it is thought that this effect will not often be very significant."

OTHER questions involved in ascertaining the rate base, together with the nature of opposing views, are set forth with like thoroughness. His conclusion is thus stated:

"This whole field of public utility valuation is admittedly one of the most complicated in the field of regulation. It has been a constant battle ground for lawyer, economist, accountant, engineer, and public administrator. The latter approaches the problem with the ease or difficulty of administering any proposed program, as a foremost consideration. Since he is burdened with many cares, this aspect weighs heavily in his mind. The economist approaches the problem with refinements of the value concept, theories of general welfare, and long run points of view. He finds that what regulation is attempting to find is not economic value in the strict sense of the term, but rather a rate base on which the people of the United States are willing to permit the carriers to earn a fair return. The lawyer approaches the problem with the constitutional requirements of due process and attempts to understand the language of all the other experts and harmonize them with the law of the land. It is a veritable Babel of confusion. Doubtless, some progress has been made in formulating definite policies and procedures, but doubtless, too, the problem will be with us for many years."

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Valuation, as far as utilities are concerned, plays a much less important part in rate making than it is commonly supposed to do. It is used by the utilities occasionally as a defensive measure against alleged confiscatory rates, or as a means of increasing rates alleged to be too low. In the great majority of cases, rates are fixed without reference

to valuations. A valuation, however, may be an important check on reasonableness; and the right to valuation may be invoked either by the companies or the ratepayers.

—D. L.

RAILROAD VALUATION. By Prof. Lewis C. Sorrell, *The Traffic World*, November 9, 1929.

Advocates of the Investment Theory of Valuation Look to Legislation for Succor

THOSE who favor investment rather than value as the rate base appear to be looking for relief from the rulings of the Supreme Court by way of legislation. The advocates of the investment theory are good fighters. They are resolved never to give up the ship. They have never been able to see anything in the decisions of the Supreme Court which would prevent putting the investment theory into effect. Now, however, they are not relying so much on Commission action as on legislation.

In an address before the Muscle Shoals Conference of the Public Ownership League, November 23rd, Rev. John A. Ryan, D.D., spoke on "Valuation Ethics and Supreme Court Decisions." Dr. Ryan spoke of the situation produced by the Supreme Court decisions as a "predicament." He believes this can be relieved by legislation. He said:

"In this predicament relief can come only from the source that ought to have provided it years ago, namely, the Congress and the state legislatures. More than once the Supreme Court has declared that rate making is a legislative function. Since rates cannot be intelligibly or fairly made without guiding rules and principles, the authority which is charged with that function ought to provide these rules and principles. Of course, the legislatures could not do this arbitrarily. They could not lay down rules and principles which would contravene the 'due process' clauses of the Constitution as interpreted by the Supreme Court. Within the limits thus far indicated in the decisions construing these clauses, there seems to remain considerable

latitude for the legislatures. Suppose that Congress should amend the valuation section of the Transportation Act by specifying that the Interstate Commerce Commission should not fix the value of any railroad more than 25 per cent above original cost. It is not impossible that this measure of the weight to be accorded to reproduction cost would be upheld by the Supreme Court. At any rate, the experiment would be well worth making. Similar laws ought to be enacted by the state legislatures to guide and govern the State Commissions in their valuations of public utility properties that lie wholly within their several jurisdictions. Finally, both Congress and the state legislatures should fix the maximum rate of return to be allowed the utilities in rate-making proceedings. This rate should be high enough to attract new capital, but there is no reason why it should be higher. The longer the legislative branches of our governments defer the fulfilment of these obvious obligations, the greater will be the uncertainty confronting the regulating Commissions, the larger will be the expenses of litigation in rate-making cases, and the heavier will be the unnecessary burdens imposed upon the consumers of public utility services."

THE trouble with this suggestion, it seems to us, is that value cannot be established by fixed standards. The Supreme Court has often been criticized for not being more definite in setting up standards of value and in setting the question of the weight to be given various factors considered in arriving at value; but this is not possible. Saying that not more than 25 per cent shall be added to original cost in establishing value would be no better than saying that value shall be fixed at original cost. The value of a piece of prop-

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erty at a given time is a question of fact which cannot be determined by a yardstick.

Original cost and reproduction cost are factors which are usually taken into consideration in arriving at value. The utilities often claim that the value should be fixed by reproduction cost, but value can no more be fixed by reproduction cost than by original cost.

EARNING power is one of the factors bearing on value mentioned in the often cited *Smyth v. Ames* Case. Ordinarily this factor cannot be taken into consideration at all, in a case in which the reasonableness of rates depends upon the reasonableness of the company's return on value, as it would lead to reasoning in a circle. There might, however, be occasions on which the earning power of the company would be a more important factor for consideration than either original cost or reproduction cost.

For example, suppose a public utility, as sometimes happens, is established in a mining community which declines. Let us assume that the plant cost \$1,000,000 and that it would cost \$1,500,000 to reproduce it. Let us eliminate questions of depreciation and assume that the plant remains as good as new.

Ten years after it is built the mining industry has petered out. Most of the miners have moved away. The number of consumers of utility service

has so declined that the best the company can now do is to make its out-of-pocket expenses. There is no chance for any return even on the original cost of the property, and let us assume there is no hope that there ever will be. In valuing that property for any purpose, which would be the most important factor to be taken into consideration, original cost, reproduction cost, or earning power?

There is no fixed relation between original cost and value, or between reproduction cost and value. Other factors may have to be taken into consideration for what they are worth. The question of value is a question of fact; not of legislative definition.

It may be there is some way by which the advocates of the investment theory can get around the constitutional provision against confiscation, but it is not likely to be by way of legislative definition of value.

A legislature can, of course, fix a definite rate of return, provided it is not confiscatory or otherwise unreasonably low. But in the long run neither legislature nor courts can fix a reasonable rate of return. In the final analysis the man who has the capital to invest is the one who has the say about that.

—H. C. S.

VALUATION ETHICS AND SUPREME COURT DECISIONS. By Rev. John A. Ryan, D.D., Professor of Economics, Catholic University of America, Brookland, D. C.

When Rate Cases Should Be Tried in the Court of Public Opinion

SHOULD rate cases be tried in the newspapers? The answer is "yes," according to the American Gas Association Subcommittee on the "Practical Handling of Rate Cases," which has this to say about informing the public through the press:

"Opposition is sometimes voiced 'to trying the case in the newspapers.' If politically-minded persons take advantage of the increasing of some bills to raise a dis-

turbance, the unfavorable part of the rate change is bound to receive considerable publicity. It is, therefore, only fair to the company and to the Public Service Commission which must decide the case that both sides be given equal publicity and that the rate change be properly explained to the public. A Public Service Commission is not exactly a court. If every customer could be present when the company submitted its case, it would be helpful, for it would offer a great opportunity to educate the customers as to the advantage of

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proper rate forms. This being impossible, the next best thing is to take the case to the public through the newspapers and to do as much educational work as possible. Even if there is no public opposition, the company owes it to the customers to make explanation of the rate change and of the advantages to be gained by all concerned."

The average American will probably say "fair enough" to that proposition.

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Remarkable Remarks

THADDEUS H. CARAWAY
U. S. Senator from Arkansas.

"Regulating people by Commissions has become a reigning obsession today in America."

SAMUEL INSULL
*Chairman of Board, Middle West
Utilities Company.*

"Of course no such thing as a 'Power Trust' exists, and, unless complete state ownership of power production and distribution is brought about, none can exist."

MATTHEW S. SLOAN
*President, National Electric
Light Association.*

"The (public utility) industry requires sane laws and an attitude of the public mind which will not put it into a straight jacket and thwart or handicap its proper economic growth."

WILLIAM H. HODGE
*Vice-president, Byllesby Engineer-
ing and Management Corporation.*

"The demagogues devoting themselves to the utilities would like to have every editor feel that his readers believed him bought if his paper carried gas or electric company advertising."

HARPER LEACH
Magazine writer.

"If the so-called Public Ownership League of America isn't a propagandist body which should be included in any investigation into the activities of such organizations, there is no such thing."

E. F. JEFFE
Engineer.

"The great need of the consumers of this state (New York) at the present time is a representative on the Public Service Commission who will act as the consumers' legal adviser."

ED HOWE
*Retired newspaperman of
Atchison, Kansas.*

"The men of greatest distinction now are not professors or writers, or agents, or welfare workers, but business men; we have tried to destroy them, but they are so important, so necessary, we cannot."

HEYWOOD BROWN
Newspaper columnist.

"Time was when every rich industrialist was of necessity a villain. The captains of finance were the men behind the trusts and the trusts ground down and exploited the poor. Once upon a time the notion held sway that if the Government would only compel competition in every form of business we should all be rich, happy, and the possessors of full dinner pails."

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NORMAN THOMAS
*Late Socialist candidate for
Governor of New York.*

"At least one (public service) commissioner should be appointed to represent any third party polling in excess of 100,000 votes."

GEORGE ROTHWELL BROWN
Newspaper columnist.

"The Interstate Commerce Commission appears to have consolidated pretty nearly all the rails in the country except the congressional track of mind."

ARTHUR BRISBANE
Heorst's editorial writer.

"It is agreed by all in authority, including the Government, that our Government is neither honest nor able enough to manage railroads. The Canadian government does it, with admirable success, but Canada's government, presumably, is abler and more honest than ours."

SAMUEL INSULL
*Chairman of Board, Middle West
Utilities Company.*

"When things are moving along normally, a very large number of those who will admit they are our best citizens put in their spare time damning the utilities for sins of omission, commission, and imagination. But when help is needed to render a service or to carry a load the first call that goes out is to the utilities."

ED HOWE
*Retired newspaperman of
Atchison, Kansas.*

"Why can't husbands do for the women what telephone managers do for them? Telephone girls are polite, womanly, charming, industrious, useful every hour of the day. . . . I do not accept the theory that the telephone company is merely a Soulless Corporation; its managers are good and useful men, and great teachers."

HEYWOOD BROWN
Newspaper columnist.

"Sooner or later the American consumer must face the hard fact that he will never benefit in the long run from cutthroat competition, be it in oil or meat, transportation or woollen garments. After all price must depend ultimately upon cost of production, and too many cooks not only spoil the broth but make it more expensive."

FRANKLIN D. ROOSEVELT
Governor of New York.

"I am very certain that if a definite test case were to be carried to the Supreme Court to-morrow, that body would not hold that reproduction cost is the true ultimate basis for (public utility) valuation; and further, I do not believe that the Supreme Court has closed the door on the prudent investment theory which was the original basis of regulation by Commission."

The March of Events

California

New Investment to Follow Street Railway's Fare Increase

EXPENDITURES totaling several millions of dollars, says the Los Angeles *Herald*, will be announced by the Los Angeles Railway Corporation as a result of the decision of the United States Supreme Court upholding a 7-cent fare.

The decision of the Supreme Court has apparently not discouraged those who demand a 5-cent fare. The Los Angeles *Examiner* informs us that on December 10th City At-

torney E. P. Werner went to San Francisco to confer with Commission officials to determine what action could be taken to reinstate the 5-cent fare.

Between \$2,000,000 and \$3,000,000 worth of refund checks, it is said, have been issued by the Los Angeles Railway since October 21, 1928, when the 7-cent fare went into effect. These, presumably, will now be worthless scraps of paper. They have been collected and have been used largely for speculation. Business institutions, notably several dance pavilions, it is reported, have accepted the checks as "scrip."



Connecticut

Would Compel Action against Commission

PROFESSOR Albert Levitt, according to the New Haven *Times*, has charged that Deputy Attorney General Ernest L. Averill is acting as defense counsel for the State Public Utilities Commission rather than as state attorney general. This charge was made after Professor Levitt had finished preliminary reading of the opinion emanating from the Attorney General's office stating reasons for refusal to bring action to remove the

Commission. A petition to secure action had been filed by Professor Levitt and others.

It was reported that a mandamus proceeding would be started to compel the Attorney General to bring action against the Commission for not ordering the elimination of more railroad crossings. The Attorney General had taken the position that the Commission must exercise its discretion in ordering railroad crossings to be eliminated, and that there was no statutory provision compelling the Commission to order elimination regardless of the financial condition of the railroad.



District of Columbia

Commission Proposes Merger and Railways Appeal Fare Edict

A NEW merger proposal for the Washington transportation companies has been submitted to Congress by the Public Utilities Commission. At the same time the Washington Railway & Electric Company and the Capital Traction Company have filed suit in the District supreme court to upset the Commission decision denying a 10-cent cash fare with four tokens for 30 cents. The companies asked the court to fix higher fares pending trial of the appeal.

It is too early to prophesy what will happen to this merger proposal. The last merger bill failed to receive the approval of Congress. Some of the controversial points which blocked the other merger plans have, however, been eliminated. For example, detailed reference to the form of the merged companies' capital structure has been omitted and will be left for the approval of the Commission.

One of the outstanding features of the new plan, as reported in the Washington *News*, is that it removes from the courts the power to disturb valuations to be placed in the future on street car property. On rates regulations and orders, and decisions

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other than those fixing rate base value, may be appealed to the courts, and these only on the claim that they are confiscatory.

The Commission seeks from Congress, in the new merger plan, power to fix reduced car fares for school children. The question whether it now has that power has been dis-

puted, but several organizations have been working hard to secure more favorable rates for pupils.

The suits brought by the railway companies characterize the 8-cent fare as inadequate, unreasonable, and confiscatory of the properties and rights of the companies.

Georgia

Commissioner Perry to Be Candidate for Governor

JAMES A. Perry, present chairman of the Georgia Public Service Commission, on December 14th announced that he would be a candidate for governor of Georgia in the primaries of 1930. He has made a statement to the people of Georgia pledging his best efforts to bring about the solution of

problems relating to rehabilitation of agriculture, taxation, public utility matters, economies in government, and other problems of interest to the taxpayers. He says in part:

"I am a candidate for governor, subject to the Democratic primary to be held in 1930. Believing that I am qualified to render an impartial and efficient discharge of the duties of this exalted trust, I earnestly appeal to you for a sympathetic and favorable consideration of my candidacy."

Illinois

Council Objects to Useless Expense in Fighting Rates

THE city council of Chicago has indicated that Corporation Counsel Ettelson must prove that the city has some chance of winning before it will appropriate \$308,000 to fight the elevated railroad fare increase. The *Chicago News & Journal* comments upon the situation as follows:

"Growing resentment against the corporation counsel for letting them hold the bag in this case has become apparent among many of the aldermen. In his request for the money Ettelson wrote to the council that 'a vote against this appropriation is a vote in the interest of the Chicago Rapid Transit Company and against the interest of the people.'"

"Some of the aldermen want to know just how the city's legal head proposes to use the money if it should be given to him. He has informed them that it would be spent in making an appraisal of the elevated road

properties.

"To win the case along this line, however, engineers have figured that the city must prove the company's properties are worth no more than \$55,000,000. This, they say, is hopeless, for the several valuations made by competent and unbiased engineering firms in the last ten years have never been less than \$70,000,000.

"In addition to this the city, in 1925, agreed to a valuation of \$86,000,000 and now has virtually accepted the D'Esposito figure of \$95,500,000 as a fair appraisal of the properties.

"So it's foolish for the city to try to win this case by trying to prove such a low valuation as \$55,000,000, which would be necessary," said one leading Chicago engineer.

"Asked if he had any idea how much a valuation would have to be for the city to win the case, Ettelson admitted that he did not know. Nor has he had any assurances from any engineering firm that they would be able to make a valuation that would enable the city to win the case, it became known."

Kansas

Permission Sought to Compete in Wichita Gas Business

THE Public Service Commission on December 4th heard the application of the Wichison Gas Company for a certificate of

convenience and necessity which would permit it to sell domestic gas in Wichita in competition with the Wichita Gas Company. The Wichison Company had already secured a franchise from the city.

The city of Wichita for several years has been seeking lower gas rates in the courts.

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Failure to secure a reduction, it is said, resulted in an agreement between the city officials and the Wichison Company whereby the firm was granted its franchise. The Commission ruled that it had jurisdiction to determine whether the new company could operate and proceedings before that body were commenced.

During the testimony, according to the *Wichita Eagle*, Logan Cary, vice president of the Wichison Gas Company, said that he was willing to recommend that his company

sell gas to the Wichita Gas Company at the city gates for 25 cents per thousand feet. This inspired the city officials to start a movement for a reduction of 15 cents in the rates of the Wichita Company, since in the past the Wichita Company had contended that it paid 40 cents at the gates and could not sell cheaper gas.

The Commission has started to investigate these rate matters, and, it is stated in the *Wichita Eagle*, a hearing will be held on January 15th.



Maine

People, Not Utilities, Protected by Eminent Domain Law

THE law of eminent domain is a part of constitutional law not to protect the utilities but to protect the people, said Representative Edward E. Chase at a meeting of the Cape Elizabeth Grange on November 28th. He declared that it is an assertion on the part of the people that no one man shall have the right to stand in the way of the development of the whole community.

Representative Chase pointed out that the railroad, the telephone company, and practically every utility company in Maine had been developed through the use of eminent domain, and that every utility had been given that right except the power companies. He defended the right of the electric power companies to seek enactment of legislation giving them the same right.

"The last legislature passed the bill by a very small vote," he continued, "and some of those who spoke against it at that time did not know what they were talking about. One said that the power companies would be able to take any land they wanted without paying a cent for it. This is not true. A power company would have to go before the county commissioners and prove to their satisfaction

that they can't reasonably put their power line anywhere but on certain land, and when they have satisfied the county commissioners of that they must go before the Public Utilities Commission and prove the same to their satisfaction. Some of the law's opponents painted a dismal picture of high powered wires falling down and electrifying wire fences, killing cattle and children, but no one can give a single instance where that thing has happened.

"The law passed the last legislature and then some one who didn't like it went up and down the state telling things that were not so and secured about 11,000 signatures on referendum petitions—hardly enough more than was required and certainly not enough to indicate that there was any tremendous opposition to the law. The petitions were thrown out on proper legal defects. Now they are petitioning for repeal of the law and about 99 per cent that is said is all poppycock."

The speaker also discussed the question of outside capital. He remarked that it seemed that Maine always had a resentment against outside capital, but when he tried to sell securities of Maine companies to Maine people, they refused to commit their capital. There was said to be no alternative to outside capital except stagnation.



Excise Tax on Hydroelectric Utilities Discussed

MEMBERS of the State Grange at a meeting on December 10th were urged by State Assessor A. H. Merritt to work with, and not to fight, the power companies. This followed a speech by Judge George C. Wing, Jr., of Auburn, who had spoken in favor of such a tax.

Judge Wing, according to the newspaper reports, stated that certain hydroelectric companies having a valuation, according to the state assessors' reports, of \$21,000,000 had

outstanding securities to the amount of \$36,000,000. He reviewed the history of the movement for an excise tax, which has been in progress for several years.

Mr. Merritt informed the Grangers that the state assessors do not make the valuation but it is made by the local assessors, and is in accord with the usual practice of valuing for taxation purposes, at about 60 per cent of the actual worth of the property. First, he said, in consideration of the difference in the valuation of these properties and the amount of securities issued, the general practice of assessing must be considered. In communities where there is a very high tax rate

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it almost invariably follows that there is a low valuation. Where the tax rate is low, the reverse is the order.

He said that for himself he was willing to see an excise tax placed upon the power companies if he could be shown that the tax would not be passed on to the consumer in

rates. As a member of the fact-finding committee which studied the power question last year, he had learned that from 2 to 3 per cent of the cost of producing and distributing electricity was charged to taxes, and of course it would find its way into the consumers' bills.

Maryland

Electric Rate Slashes Benefit Many Communities

THE Eastern Shore Public Service Company and its subsidiaries have secured Commission approval of schedules effecting a vast reduction in the rates for electrical service in more than one hundred communities, according to a report in the *Salisbury News*. Based upon the present business of the company, it was estimated that the new

rates would reduce gross revenues by \$115,000.

The rates for domestic service are based on the number of rooms in customers' houses. For an average 6-room house, it is stated, the entire charge will be reduced and the lower rates will permit the economical use of various electrically operated household devices such as electric irons, percolators, vacuum cleaners, and refrigerators. Commercial rates and power rates have also been adjusted.

Massachusetts

Too Much Talk at Rate Hearings

CHAIRMAN Henry C. Attwill, at the resumption of the Edison rate investigation on December 18th, according to the *Boston Transcript*, threatened to recommend to the legislature that the appropriation for stenographers be dispensed with unless lawyers and others representing various interests before the Commission should cease making long speeches.

This was occasioned by an attempt of Wycliffe C. Marshall of Watertown, representing certain customers, to introduce as direct evidence a copy of testimony given before the Federal Trade Commission at Washington regarding the activities of public utilities in influencing the public mind. F. Manley Ives, counsel for the Edison Electric Illuminating Company, objected to its introduction on the ground that it was not a public document but a mere record of something which occurred before another tribunal. Mr. Marshall then attempted to read from the report.

Minnesota

Commission without Power to Initiate 5-Cent School Fares

THE Railroad and Warehouse Commission cannot on its own volition take action to establish a 5-cent fare for school children, according to an opinion issued on December 10th by John F. Bonner, Assistant Attorney General. This ruling was handed down in response to a request from the Commission

for information as to its legal authority.

It is pointed out that the authority to initiate an investigation of this matter is limited to the city and the street railway company. The Commission, it is said, can initiate a proceeding on its own motion only to determine whether there has been a change in property values or cost of service sufficient to warrant a change in fare. The opinion states that the situation suggests no change in property values or cost of service.

Missouri

Experimental Street Car Fare Raised in St. Louis

AN increase in the experimental street car fare in St. Louis has been agreed upon, with the approval of the Commission, for a test period of ten weeks beginning December

30th. The new fares will be 12-ride tickets for \$1 instead of 90 cents and the children's fare which has been 3 cents will be increased to 5 cents cash with 6 tokens for 25 cents. After the 12 rides are used the ticket holder may have additional rides for 5 cents each on the ticket stub within the week as at present. The 10-cent cash fare remains.



New Jersey

Higher Trolley and Bus Fares Stir Cities to Action

ANOTHER flurry in New Jersey, comparable with the excitement stirred up when the gas rates were raised, has resulted from the action of the Commission in permitting Public Service Co-ordinated Transport to charge 10 cents for the occasional rider of its busses and trolleys and to sell 10 tokens for 50 cents. The Commission did not approve the new fares but merely failed to suspend. City attorneys in various municipalities have been instructed to oppose the increase.

Justice Kalisch, of the supreme court, on December 21st, after hearing arguments, refused to grant a writ of certiorari to save

the present fares. He referred the matter to the supreme court branch of three judges, which will meet at Trenton on January 21st. He remarked that a tryout for three months might determine whether the experiment was justified. It was said that if riders bought tokens, they would not face any increase in fares.

When the Commission permitted the change in fares it took up with the company the question of reducing electric rates. As a result a new rate schedule has been filed by the Public Service Electric & Gas Company which is estimated to reduce the cost to consumers \$1,300,000 annually. The schedule makes reductions in the residential rates and in the general lighting and wholesale energy rates of the company.



New York

New York Telephone Rates Are again before the Court

THE Federal statutory court which recently decided that the New York Telephone Company is entitled to a 7 per cent return on its property and found that the value as of July 1, 1928 was \$475,590,609, reserved decision on December 17th on the form of the order to be signed by the court, after argument by counsel for the company, the city, and the Public Service Commission.

A form of order submitted by the company was attacked by M. Maldwin Fertig, of the

corporation counsel's office, on the ground that it failed to consider increase in depreciation reserve which should have reduced the fair value of the company as of July 1, 1928 by about \$19,000,000. He asked that the company be obliged to specify the rates it will charge pending the posting of new rates by the Commission.

The court ordered the various attorneys to submit additional memoranda on the present value of the company's property and also on the items of depreciation. A request by Edward L. Blackman, counsel for the company, to submit additional testimony was denied.



Rehearing Asked in Brooklyn Borough Gas Case

CORPORATION Counsel Arthur J. W. Hilly, on December 18th, asked Commissioner George R. Lunn to order a rehearing on the rate schedules of the Brooklyn Borough Gas

Company. He contended that the Commission's approval of a \$1 flat rate for the first 200 cubic feet of gas and a subsequent charge of 10 cents for each additional 100 feet was unfair and a burden to the small consumers.

Commissioner Lunn stated that he could not act for the entire Commission, but he asked Mr. Hilly and Maurice Hotchner,

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counsel for the Gas Consumers' League and the Utility Consumers' League of New York, to submit briefs. These attorneys, it is reported, have announced that if the Commis-

sion refuses to reopen the case they will take the matter to the appellate division of the supreme court and there seek a reversal of the Commission action.



Oregon

Intangible Values Cause of Dispute in Rate Case

A DIFFERENCE of about \$13,000,000 between the valuation of the Portland Electric Power Company and the valuation admitted by the city of Portland is one of the chief points of controversy in the investigation of rates now under way before the Commission. This amount represents such items as intangibles, development costs, water right values, and overheads.

A valuation for the property was fixed by the Commission in 1916 and this is the first time since that proceeding that the Commission has held a formal and extensive hearing on the subject. The company has claimed a valuation of approximately \$70,000,000, while the city demands that the valuation be cut to approximately \$58,000,000. An adjournment of the hearing was taken on December 2nd in order to give representatives of the Commission, the city, and the company an opportunity to attempt to search the maze of figures until the points of difference are brought out standing alone, when the disputed points would go before the Commission.

In addition to the question of electric rates, the Commission has under consideration an application for authority to increase car fares

from 8 cents to 10 cents. The value of city lines was given by company witnesses as approximately \$15,000,000, and the interurban lines as approximately \$7,000,000. The Portland *Oregonian* says in regard to street car fares:

"Hardly anyone rides the street cars anymore, except policemen, who go about when off duty with pockets full of free tickets, or so it appears from evidence submitted yesterday by the Portland Electric Power Company at the hearing before the Public Service Commission on car fares and residential lighting rates.

"Street car men and other employees of the power company are permitted to ride without cost, but they spurn the trolley and use their automobiles, at least a very large portion of the people who have the privilege of riding free are spurning the trolleys, for the number of passengers using passes dropped from 3,000,000 in 1918 to 2,000,000 in 1929.

"The Public Service Commission, speaking through its attorney, W. P. Ellis, served notice on the city at the morning session of yesterday's hearing that it proposed to abolish the distribution of the free tickets, and that it intends to take the cost of paving between tracks, bridge tolls, and franchise taxes off of the street car patrons and place them upon the people who pay property taxes."



Telephone Rates Reduced

A NEW schedule of rates containing many reductions was to go into effect on January 1st in the territory served by the Pacific Telephone Company. The total gross reduction to phone users of the state was said to be approximately \$100,000 a year. The Klamath Falls *Herald*, in a recent issue, explained the operation of the new tariffs and their effect on customers, stating in part:

"Under the new schedule the charge for connection of service will be entirely eliminated in one case and reduced from 14 to over 50 per cent in other cases. Monthly rates for extension telephones will be cut from 20 to 33 1/2 per cent.

"The changes were summarized by H. R. Risley, state manager for the Pacific Telephone & Telegraph Company, who stated that they are in keeping with the fundamental

policy of the company, which, he said, is to provide the best possible service at a cost as low as is consistent with financial safety.

"The \$1.50 charge for connecting service, commonly known as the change of name charge, will be eliminated. Other reductions for connecting service are as follows: Service connection charge for residence and residence extension telephones will be reduced to \$1.50. The service connection charge for private branch exchange telephones will be reduced from \$3.50 to \$1.50. The service connection charge for residence telephones will be reduced from \$3.50 to \$3.

"Reductions in monthly rental rates for extension telephones apply to wall and desk sets and are as follows: Reduction of 25 cents a month for business and residence flat rate extensions, and reductions of 25 cents a month for extension telephones without a coin box or coin box service."

Pennsylvania

Fare Cut Encourages Riding

AN experiment of the Philadelphia Railways Company in reducing trolley fares has been successful, says the *Philadelphia Record*, and in December it was proposed to continue the lower fares for at least another three months.

Four months ago the company obtained permission from the Commission to cut the fare on its line from Third and Jackson streets to Ninety-fourth street and Tincum avenue from 20 cents to 10 cents. This reduction was made conditional on the agreement that at the end of three months if the number of passengers did not increase the 20-cent fare would go into effect once more. The traffic on the line, it is reported, has increased by several thousand and the revenues have taken a sharp jump upwards. The *Record* tells us:

"The Philadelphia Railways Company is

the only concern operating trolleys in the city which is not a subsidiary of the P. R. T. The Tincum line takes the workers from South Philadelphia to the great industrial plants along the Delaware river, and the former 40-cent round trip fare was found to be such a hardship that the patrons of the line sought other means of travel. It was to bring back these passengers that the company tried the experiment of cutting the fare in half."

A reduction in two classes of fares in the suburban sections of Philadelphia, says the *Philadelphia Bulletin*, has been announced by the Reading Company. The management believes that lower cost transportation will act as a stimulus to attract the home-builder as well as the prospective suburban resident and materially affect the general growth and prosperity of the entire area to the north of Philadelphia, which is served by the lines of the Reading.



Company Can Refuse Water Service for Refusal to Pay

THE Scranton-Spring Brook Water Service Company has the right to turn off water and withhold service from consumers who fail to pay the rates authorized by the Commission, according to a decision by Judge W. S. McLean handed down on December 4th in the rate war between the water utility and the Municipal Water Ownership League with their followers.

An injunction was granted restraining officers of the league and those assisting them from interfering with the business of the water company or its workmen and from turning on the water after it had been shut off.

The rates are still under investigation by the Public Service Commission. Final hearings were held on December 6th. The case originated in July, 1928, when seventy municipalities and individuals protested against proposed increases in rates.

Temporary rate increases were authorized by the Commission pending its final determination. The Municipal Water Ownership League led in a battle to prevent the company from discontinuing the service to consumers who refused to pay the increased charges. Judge McLean, in upholding the company, said in part:

"The propriety of the rates charged in the new tariff is now before the Public Service Commission for determination and pending the disposition of this question by that tribunal, a consumer must pay on the basis of

the new tariff. In individual cases of hardship the company has expressed its willingness to continue service notwithstanding the inability of the consumer to pay the legal rates in full; in every case the company is within its rights in discontinuing service after notice and failure to pay the legal rates. In such instances where the service has been discontinued for failure to pay the legal rates, neither the consumer, nor those acting for him, may restore the service by operating the turn-off valves, but the company is required to restore the service when legal requirements have been met and upon failure so to do, redress may be had through the Public Service Commission and the courts. It follows, therefore, that those who assume, without consent of the company, to open the turn-off valves and thus restore service are trespassers and where such practices are persisted in, they constitute a continuing trespass which should be restrained by injunction.

"Accordingly, now, December 4, 1929 a preliminary injunction is granted enjoining and restraining the respondents . . . from injuring or interfering with the operation or conduct of the business of the plaintiff, or with the free exercise of the rights and franchises of the plaintiff by threatening, intimidating, insulting, annoying, following and directing abusive and derisive language and opprobrious epithets, or in any other manner obstructing workmen of the plaintiff when shutting off the water supply of persons in arrears for water charges, or by in any manner whatever turning on the water supply after same has been shut off by the plaintiff and its workmen."

Tennessee

Water Rates Compared

THE subject of water rates has been receiving the attention of a number of citizens of Chattanooga following the action of the City Water Company in announcing that a slight increase in some of its rates would be sought. A special committee of the chamber of commerce has been studying the question.

An inspection of the rate schedules in various cities, says the *Chattanooga News*, reveals a vast difference in rates. Nearly all cities, it is said, have rates different in at least some respect or other. The report in the *News* informs us:

"Another feature is the fact that an overwhelming majority of the waterworks systems in the United States are municipally owned. A list of about 80 cities picked at random reveals that only about 10 out of that number are privately owned. The others are all public property. It is estimated that about 75 to 85 per cent of the systems are publicly owned. Of these 80 cities less than half have lower rates than Chattanooga.

"There is such a wide variance in rates that it would be quite hard to figure just what an average water rate is. The average would perhaps be somewhere around that of

Chattanooga, judging from a list of cities made up of a few cities of average population from the various sections of the country.

"The privately owned water companies studied have the following rates: Chattanooga, 25 cents; Anniston, Ala., 33 cents; Bisbee, Ariz., \$1.50; Little Rock, Ark., 40 cents; Pine Bluff, Ark., 50 cents; Berkeley, Cal., 31 cents; Boise, Ida., 33 cents; Peoria, Ill., 39 cents; Gary, Ind., 25 cents; Utica, N. Y., 40 cents, and Racine, Wis., 27 cents.

"Maximum domestic water rates in the various cities included in this list vary from 7 cents to \$1.50 per thousand gallons. Both Salt Lake City and Schenectady, N. Y., have 7-cent rates, although this is very likely not the lowest rate in the country. Bisbee, Ariz., with its \$1.50 maximum, seems to head the list.

"To make the comparison, one must have in mind the local water rate for at least the first two steps in the schedule, which are the only rates the water company is planning to change. It is proposed to raise the minimum monthly bill from 75 to 80 cents and the rate for the first 50,000 gallons from 25 to 26 cents per thousand gallons, and the second 50,000 gallons from 20 to 21 cents per thousand gallons."



Texas

Compromise in Prospect on Fort Worth Gas Rates

A COMPROMISE on the gas rates to domestic consumers, it is reported in the *Dallas News*, may be the outcome of present negotiations between the city council and the Fort Worth Gas Company. The company, about two years ago, proposed to increase rates. This did not meet the approval of the city or the Railroad Commission but a Federal court rendered a decision which gave the utility grounds for somewhat increased rates on the theory that existing rates were confiscatory.

A memorandum from the gas company outlining proposed rates which call for an increase of approximately 2 cents a day or 36 cents a month maximum to the individual

consumer and which will increase the annual revenue of the company by \$232,563, was submitted to City Manager O. E. Carr early in December. In the memorandum the company sets up a new valuation of \$4,973,941 on the company's plant, properties and business as against the valuation of \$3,846,979 set up by the Special Master in the Federal court proceedings. The company, using the court valuation, adds to it its capital additions since January 1, 1928.

The proposed new rate is 15 cents a hundred for the first 800 cubic feet of gas with a minimum monthly bill of \$1. All additional gas would cost 6½ cents a hundred cubic feet. This is practically double the existing rate for the first thousand cubic feet. It figures slightly less than the rate the company asked of the Railroad Commission two years ago, and which was denied.



Vermont

Promotional Rates for Electricity before Commission

HEARINGS before the Commission on the application of the Green Mountain Power Corporation for approval of a new rate plan were concluded on December 6th. A large number of communities were represented by attorneys who protested against the new rates.

An interesting feature of the controversy was that a difference of opinion as to whether a large part of the consumers opposed or favored the promotional rate schedules offered by the company. Although representatives of the city of Burlington opposed the rates, the Burlington city electric plant filed similar rate schedules with the explanation that this was necessary in order to meet competition of the Green Mountain Power Cor-

poration, but a protest accompanied this.

A charge of 20 cents a room per month covering fixed items of expense which all customers must bear was the center of attack. This charge, it appears, does not pay for any current, which is at the rate of 5 cents per kilowatt hour for a small amount of current and 3 cents a kilowatt hour for excess use, except in some communities not considered "metropolitan" where a 54-cent rate would apply. Attorney General Carver suggested that a 10-cent flat rate with gradual reduction as larger amounts of current is used should be substituted, with no room charge and a minimum charge of \$1 a month.

The proposed rate will result in a reduction in cost for most of the domestic consumers, it is claimed by the company officials, but may be an increase for users who do not take a sufficient quantity of current to meet a fair proportion of the fixed charges.



Wisconsin

City and Suburbs Conflict on Fare Question

THE Commission, on December 6th, completed its hearings on the question of fares in Milwaukee and its suburbs. A fare schedule was presented by the Electric Company providing for a 10-cent single fare, 6 tickets for 50 cents, and \$1 for a weekly transferable ticket. The city attorney did not object to a 10-cent single fare for casual riders but asked for a modification so that 8 tickets could be purchased for 50 cents. The common council, however, on December 16th adopted a resolution opposing any increase.

Conflicting interests of the city of Milwaukee proper and suburban areas have played an important part in this rate case. Representatives of the suburbs have contended that the business men downtown are interested in the outlying communities and that a fare which will appeal to the people of the suburbs and make more car riders will encourage the people to do more business within the city. The suburbs take the position that the Milwaukee metropolitan community must be considered as a unit in settling street car fares.

The city appears to take the position that the single fare area is yielding practically an adequate return and that any increased revenue needed must come from the suburban area outside of the single fare area which, it is alleged, is not yielding an adequate return.

Those appearing for the city of Milwaukee

have asserted that certain charges and certain properties were not properly allocated by the company. They hold that rapid transit and interurban properties within the city should not go into the single fare area. The company contends that these properties belong in the single fare area because their fare is credited to this area for every passenger carried into or out of the city.

The councilmen took exception to the action of the city attorney in accepting a 10-cent cash fare for casual riders. Alderman Joseph P. Carney protested "against the granting of a 10-cent fare under any and all circumstances." He pointed out that this was an increase of 3 cents in the cash fare and termed it "an opening wedge for a general 10-cent fare."

Mr. Carney told the council that he discussed the matter with City Attorney John M. Niven and that the city attorney held that so many matters entered into the fare question that it was possible that some increase must be granted. The alderman disagreed with the city attorney and said that he was "surprised and grieved" at the position of the city attorney's office in the matter.

Clifton Williams, special assistant city attorney, says the Milwaukee *Sentinel*, has stated that city representatives had trimmed the rate base wherever possible but that after all this trimming they were just a fraction of 1 per cent below what the company, under the law, was entitled to earn. The difference had to come from some place and it was the opinion of the city attorney that it should come from casual riders.

The Utilities and the Public

Los Angeles Loses Its Fight for a Five-cent Fare

DURING the year of 1929, two railway decisions of first class importance involving the cities of New York and Los Angeles respectively and resulting in verdicts contrary in their effects were handed down by the Supreme Court of the United States. We have already reviewed in these pages the situation in New York and it now becomes of interest to compare the more recent Los Angeles case and to analyze the difference between the two and the causes for the ruling in one favorable to the city and in the other favorable to the utility.

It is also important to remember in this regard that the New York controversy was *not* settled by the highest court, nor is it settled at this date. That decision merely sends the proceedings back into the New York courts for a determination of the right of the Commission of that state to refuse to interfere with the rate contracts between the city of New York and its subway company, but in the Los Angeles case the Supreme Court refused to send the case back to the state courts and decided then and there that the 5-cent rate fixed by the alleged rate contract between Los Angeles and the street railway company was ineffective. Why this distinction?

The power to fix the rates of utilities is what is known in constitutional law as a "police power," and a police

power is one of the inalienable attributes of a sovereign state. It may be delegated but only subject to recall by the legislative body of the state and furthermore delegation of such powers is strictly construed by the courts. The presumption, in case of any doubt, is always resolved against any further grant, extension, or delegation of power than is clearly expressed by the language of a statute. This is because the courts have from the beginning jealously guarded all police powers of the sovereign, keeping them with the sovereign whenever possible to do so by judicial fiat.

From time to time since 1886 the Los Angeles Railway Corporation has obtained from the city authority by way of franchises to operate its street railway system. Each franchise provided that the rate of fare should not exceed 5 cents. In 1926, the company asked the Commission for a rate increase to 7 cents. In 1928, the Commission denied the application, refusing to interfere with the rate fixed in these alleged franchises. The Federal District Court then directed an injunction against the Commission order on grounds that this rate is confiscatory and the Commission and city of Los Angeles appealed to the United States Supreme Court.

The sole controversy was whether the utility was bound by the rate fixed in its franchises—it being conceded that the 5-cent fare was inadequate

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to produce a fair rate of return in the absence of a valid contract. The Commission claimed that the city had the power to enter into such contracts, and that the franchise provision constituted, therefore, binding rate agreements between the parties. The utility, on the other hand, contended that the state has never delegated to the city the power to fix rates.

Mr. Justice Butler, delivering the opinion of the Court, carefully scrutinized the statute of California upon which the city and Commission based their claims that the legislature had delegated the alleged powers. He found that they were either too general or inapplicable. The general powers of a municipality are not sufficient for this purpose. The grant must be specifically expressed. In holding that the city had no power to fix rates by contract, the Court said:

"This Court is bound by the decisions of the highest courts of the states as to the powers of their municipalities. Our attention has not been called to any California decision, and we think there is none, which decides that the state legislature has empowered Los Angeles to establish rates by contract. This court is, therefore, required to con-

strue that state laws on which appellants rely. As it is in the public interest that all doubts be resolved in favor of the right of the state from time to time to prescribe rates, a grant of authority to surrender the power is not to be inferred in the absence of a plain expression of purpose to that end."

Now here is the distinction between the Los Angeles and the New York cases. The California courts have never seen fit to pass upon the powers of Los Angeles, which left the matter up to the Federal Courts, and the highest court held contrary to the city's position. The New York legislature, on the other hand, had definitely and expressly given to the city of New York power to make rate contracts. There remained only the question of the effect upon such contracts of New York State Public Service Commission Law, a question of state law which the state must first be given an opportunity to determine.

That is why the New York case was sent back to New York and that is why the Los Angeles case was settled once and for all in the city of Washington.

Railroad Commission v. Los Angeles Railway Corp. No. 60.



How Are the Federal Courts Treating the State Commissions?

MORE authority to State Commissions and less interference with their orders by Federal Courts is the medicine prescribed by Commissioner Howell Ellis of the Indiana Commission for the complaints against holding companies. In his testimony before the New York Legislative

Commission investigating present effectiveness of the Public Service Commission Law of the Empire State, Mr. Ellis was of the opinion that if sufficient authority is given to the State Commissions and if such authority is properly exercised the spectre of the holding company standing

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behind many large operating companies will become less alarming.

Mr. Ellis said that he did not believe there was any need for the regulation of public utility holding companies if the State Commissions had authority to regulate the rates and, in so doing, had the power to scrutinize the operating expenses of the operating utilities. He thought there was an unfortunate tendency to look to Washington for utility control and intimated that the Federal Courts were possibly picking on the Indiana Commission. He stated:

"The trouble in connection with utility valuations and rate making during recent years, in my judgment, has been that too often the courts have been disturbing the reasonable judgment of State Commissions arrived at after a consideration of all the evidence.

"I have the highest respect for our Federal Courts, but it appears incredible to me that state regulatory Commissions are always wrong in their judgment of the evidence in valuation cases. The Indiana Commission was created in 1913 and has yet to win a rate and valuation case in the Federal Courts, although many such cases have been carried by the utilities to the Federal tribunals. In each instance the Federal Courts have found that the Commission erred in fixing valuation and rates too low."

Whether or not Mr. Ellis is correct in his contention that the decisions of the courts, particularly the

Federal Courts, have been too hard on the Commissions is a debatable point. These facts may help to throw a little light on the subject. From 1914 to 1923, 46 volumes of Public Utilities Reports containing over 5,000 decisions of Commissions in controverted cases in which opinions had been rendered, disclosed only 470 appeals to the courts from Commission decisions, in which the Commissions were sustained by the courts in 285 instances and reversed in only 185 instances, 26 of these reversals being only partial, the decisions of the appellate courts somewhat favoring both parties. A later survey taken from the cases published from 1923 to 1928 shows that 490 Commission decisions were reviewed by appellate courts. In these proceedings the Commissions were sustained 275 times and reversed 215 times.

Of course, these figures take into consideration not only rate cases but also controversies over service and other regulatory problems. Furthermore, the cases in Federal Courts are not segregated from appeals to other courts. It is to be noted, however, that Mr. Ellis's original statement covers all courts. Reduced to percentages it would appear that the Commissions were 62 per cent successful in appellate proceedings during the first 5-year period and only 55 per cent successful during the second 5-year period surveyed.



Kentucky Can Regulate Rates Notwithstanding a Charter Grant to a Utility

IN order for law and government to develop properly and logically there must be some fundamental con-

cept—some abstract theory of the source of authority, just as in religion certain qualities are attributed to the

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Godhead to explain the universe and man's relation to it.

When man started out to explain the universe by the theory of the Godhead, he found that he had to attribute for example the qualities of omnipotence, omniscience, and omnipresence. Anything less than this, the ancient philosophers reasoned, would bring their theory in conflict with their reason.

So it was when man started out to work out his ideal of government. As the first government was by a personal sovereign there was originally not much quibbling about sovereign powers. When the government became more progressive, however, it was recognized that certain rights remained, or ought to remain, in the individual as opposed to those delegated to the sovereign. This led to much juristic reasoning among the Romans in the time of Justinian from whom we got our first definite blueprints of the respective powers of the sovereign as compared with the individual. Taxation, making of money, and greatest of all, the police power, were held to be inherent qualities in every free sovereign state.

As a valid exercise of police power, the power to regulate the rates of public utilities is, therefore, inherent in every sovereign. The state may, within limits, contract with a utility as to the rates to be charged yet it may well be doubted if under the modern rule it can irrevocably surrender all regulatory power. Certainly no surrender is to be presumed. On the contrary, the courts have indulged every presumption against such surrender. A charter of a corporation claimed to work such a sur-

render must not be so construed if any other construction is reasonably possible.

An interesting discussion of these fundamental principles of government was brought about by a suit in Federal Court for an injunction by the Kentucky Power & Light Company against the enforcement of a recent rate ordinance of the city of Maysville, Kentucky. The utility was originally organized under a charter from the state providing that the utility could furnish service on such terms as the company and its customers might agree upon.

When the recent rate change was attempted by the city, the utility asked the Federal Court to restrain the new rate regulation on grounds that it was violative of the contractual obligation of its charter with the state in contravention of the constitutional inhibition against the violation by the state of the obligation of private contracts, and further that the new rate was confiscatory. The court disagreed with the utility on the first point, holding that the attempted rate regulation was a valid exercise of police power by the city but overruled the motion of the city to dismiss the case and litigation will henceforth proceed to the determination of whether the new rate is or is not confiscatory.

In rendering his opinion, Judge Dawson said that it is doubtful whether a state can irrevocably surrender all of its power to regulate rates charged by public utilities even though it may, within limits, contract with a utility as to the rates charged, and that every presumption is against such surrender. The court further observed that independently of the

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right to contract away such power, the right of a public utility to charge whatever rate it pleased was not unrestricted and contracts with reference thereto would still be subject to the common law rule that the utility could not exact more than a reasonable compensation for the service rendered. In case of a controversy as to what constituted a reasonable rate the court would have jurisdiction to determine the matter.

This decision is very interesting in

that it appears to hold that a utility's contracts with its customers, where the state fails or is powerless to exercise the police power of regulation, are subject to the common law rule of *quantum meruit*. This ruling necessarily makes the courts rate-making bodies and would make all utility contracts subject, in the absence of state regulation, to attack by individual parties on the question of reasonableness of rates.

Kentucky Power & Light Co. v. Maysville.



Sanitation Control Is Given to the Michigan Commission by a New Law

THE main reasons that many municipalities have been unable to cope satisfactorily with sewage and garbage sanitation has been because of the inability of these political subdivisions to get funds with which to build appropriate sewage and garbage disposal systems. The situation appears to have become so acute in Michigan as to result in a legislative enactment of 1929 giving to the Commission of that state control over sewage and garbage disposal. In some instances certain Michigan cities appeared to have already reached the limits of their bonded indebtedness and in other cases, regardless of the necessity, voters at the elections held for that purpose failed to authorize the issuance of bonds for the construction of sanitation facilities.

Describing the new law as one of the best pieces of legislation recently enacted, Commissioner Robert H. Dunn, of the State Public Service Commission, stated:

"Many sewerage systems in Michigan cities have been inadequate to accommodate the demands made upon them. The rapid growth of certain Michigan industrial centers has made them unable to satisfactorily handle the sewage from residential sections of the city, to say nothing of taking care of the sewage from large factories. Much of the sewage in such cases has been allowed to run into lakes and rivers and the natural result has been to cause pollution of the waters affected."

The new law is an attempt to aid political subdivisions to provide, with the approval of the State Department of Health, sanitary means of disposing of garbage and sewage so as to remedy the conditions described by Commissioner Dunn. The law permits these governmental agencies to issue bonds beyond the general limits of their bonded indebtedness or to grant a franchise for a period not exceeding thirty years to any private corporation to render the service needed subject to the general regula-

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tion of the Michigan Commission.

Pursuant to the Act the Commission has authorized the Sanitation Public Utilities Service Company to construct and operate sewage or garbage disposal plants and systems in Michigan. This company, according to Mr. Dunn, proposes to act as a holding company for other companies contracting to construct sewage disposal plants in cities and villages in Michigan and construct sewage disposal systems.

The 1929 Michigan Legislature also created a State Stream Control Commission. This body has held several meetings, citing a dozen municipalities to appear and show cause why adequate sewage disposal systems should not be constructed to prevent pollution of lakes and streams.

Further explaining the effects of the sewage control act, Commissioner

Dunn made the following statement to the press:

"By the provisions of this act it can thus be seen that there will be no reason why any municipality cannot have a proper and adequate garbage or sewage disposal system. If counties, cities, or townships have not the necessary funds to undertake or complete the work in question, or if they cannot get them as the result of authorization of the proper amount of money by a vote of the people, they can now make a contract that will give them just what they need.

"In the event of making a contract with a private corporation, no municipality need feel that its interests will not be safeguarded, for the securities of such corporation must be approved by the Michigan Public Utilities Commission; the State Department of Health must approve all plans and specifications; and in the event of rate disputes the Public Utilities Commission is the arbiter."



A Railway Bus Subsidiary Is Not a Favorite Child in Kansas

SHOULD a bus subsidiary of a railway have a preference in the granting of authority to serve new territory over existing bus carriers? This question has been answered affirmatively and negatively in the various states that have as yet passed upon it. The Kansas Commission has recently said "No."

One of the underlying principles of Commission regulation is the guarding of utility monopolies against ruinous competition in order to eliminate the economic waste attending the duplication of facilities the cost of which ultimately must be borne by the consumers. Originally this meant

protection from competition only of the same species of utility. A telephone utility, for instance, was guarded only against unnecessary telephone competition, but a telegraph company was not guarded against the entrance into the field of a telephone company although there is to some extent a certain element of competition between the two services.

With the advent of the bus in the field of commercial transportation, we have found it necessary to abandon the "in specie" doctrine of extending monopolistic protection and justly so, since transportation is a unit whether the service be over steel rails or on

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rubber tires. That is why many State Commissions are directed by statute to authorize new motor carriers only after due consideration of the probable effect of the proposed operation on existing rail service.

But a different question arises when the rail carrier itself elects to go into the field of motor transportation. Should it be given a preference over other or existing motor carriers? Is the new service merely an extension of its rail service and as such entitled to the statutory protection extended to its rail operations? Does the public policy requiring the protection of its rail service also require as part of that protection that it should also be extended to its bus operations, or does it then become a bus carrier which must take its turn with other bus carriers in the field?

The Kansas Commission has held that a motor bus company whose stock is owned solely by a railroad is "merely another bus corporation." This ruling came as a result of an application by the Interstate Transit Lines, owned by the Union Pacific Railroad Company, for permission to operate from Kansas City, Missouri, through Kansas City, Kansas, to Lawrence, Topeka, Manhattan, and Salina to the west line of the state. Heretofore this territory has been served by the Pickwick-Greyhound Company and the Cardinal Stage Lines, both of whom opposed the

granting of a certificate to the Interstate company on the ground that they had pioneered the business and, therefore, were entitled to a monopoly on the same general principle of public service regulation that usually applies to other utility services.

Notwithstanding the plea that the parent railroad company had pioneered in the railroad business for more than sixty years and paid the state heavy taxes, the application was denied over a major portion of the route requested although it was permitted to do business between certain other points in competition with one of the established carriers.

Heretofore in controversies over the establishment of new bus service it has been usual to find the rail carriers urging the rule that the authority should not be granted without due consideration of the transportation service already being rendered. The Kansas Commission, however, is apparently of the opinion that it is a poor rule that will not work both ways, and the tables were turned when the Commission agreed with the position of the objecting bus carriers that the application of the Interstate Transit Lines could not be legally granted until the Commission had first required of the objecting companies additional service over the routes covered by them and they had refused to obey such an order.

Re Interstate Transit Lines.



The Right of a City to Function as a Utility beyond Its Corporate Limits Is Sustained

VERY often we are apt to lose sight of the fact that an incorporated subdivision, be it county, city, town, or village, is a municipal corporation

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and, in many respects, it is just like any other corporation. It may sue and be sued. It has a charter and may do nothing beyond the powers granted expressly or by necessary implication in that charter. True it does not issue stock but it may issue bonds and certain other securities and its taxpayers are, for many purposes in the same position as stockholders.

A municipal corporation is said to have a dual character. It may act in a governmental capacity or in a proprietary capacity. In the former it acts as an agency of the state for the better government of those who reside within the corporate limits, and in the latter it exercises powers and privileges for its own business. The theory of the proprietary capacity is that the powers are supposed not to be conferred from considerations connected with the government of the state but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual, and as to such powers and to the property acquired thereunder and contracts made, the corporation is, in contemplation of the law, regarded as a private corporation, or at least not public in the sense that the powers of the legislature over it or the rights represented by it are omnipotent.

The general rule is that a municipal corporation has no extraterritorial powers but the rule is not without exception. The legislature has undoubted authority to confer upon cities and towns jurisdiction for sanitary and police purposes in territory contiguous to the corporation. If a municipality owns and operates a water or lighting plant and has an excess of

water or current beyond the requirements of its own residents which is available for disposal, it may make a sale of such excess to outside consumers. Without legislative power, however, this functioning as a utility outside of the corporate limits may not be assumed by the municipality. Even with such power it may only be done under certain conditions.

An analysis of this right of a city to function as a utility outside of its corporate limits was made in a recent decision of the North Carolina supreme court sustaining a legislative act authorizing the city of Fayetteville to render a public utility service within a zone extending 3 miles beyond the city limits when such service is maintained from profits arising from the business in the territory beyond the corporate limits.

The case came before the court in an action by an individual having an interest in certain electrical distribution facilities situated in the territory adjacent to the city and within the 3-mile zone. He asked the court for an order restraining the city from paying out any of its funds for the purpose of erecting and maintaining an electric transmission line beyond the corporate limits. In refusing the injunction, Judge Adams, rendering the opinion of the court, stated that neither the amended city charter nor the statutory amendments contravened the Federal Constitution by requiring taxpayers to defray the expenses of the acquisition of the plant by the municipality since such acquisition if occurring was to be financed entirely out of earnings of the plant.

Holmes v. Fayetteville, No. 285.

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RECOMMENDATIONS OF COURTS AND COMMISSIONS

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PUBLIC UTILITIES REPORTS

UNITED STATES SUPREME COURT

Railroad Commission of State of
California et al.

v.

Los Angeles Railway Corporation

[No. 60.]

(— U. S. —, 74 L. ed. —, — Sup. Ct. Rep. —.)

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Constitutional law — Delegation of powers — Statutory construction.

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Constitutional law — Rate making by municipalities — Delegation of powers.

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Statement that where a city, empowered by the state to do so, makes a contract with a utility fixing the amounts to be paid for its service, such service may not be required for either more or less than the specified rate, even though such rate be excessive or inadequate, p. 3.

[BRANDEIS, HOLMES, and STONE, JJ., dissent.]

[December 2, 1929.]

APP^{EAL} by the Railroad Commission of California to the United States Supreme Court from the decree of the Federal District Court for Southern California restraining the Commission from interfering with the putting into effect of increased rates by a street railway company; affirmed. For same case below, see 29 F. (2d) 140, P.U.R.1928E, 584.

Mr. Justice BUTLER delivered the opinion of the Court.

Appellee operates a street railway system and motor busses for the transportation of passengers in the city of Los Angeles and in other parts of the county of Los Angeles. Its cars are operated on tracks laid in the streets under authority of 102 franchises granted from time to time since 1886. A few were obtained from the county; the others were granted by the city.

Seventy-three granted between November 28, 1890, and October 21, 1918, covering 113.41 miles, provide that "the rate of fare . . . shall not exceed 5 cents."

Eighteen granted between March 2, 1920, and January 21, 1928, covering 12.33 miles, provide that "the rate of fare . . . shall not be more than 5 cents . . . except upon a showing before a competent authority having jurisdiction over rates of fare that such greater charge is justified."

RAILROAD COM. OF CAL. v. LOS ANGELES RY. CORP.

The remaining eleven, covering 10.5 miles, were granted at various times from 1886 to 1923; none of them provides that the fare shall not exceed 5 cents; but it may be assumed that under the provisions of the other ordinances a fare of 5 cents was made applicable over all lines. Prior to the decree in this case the basic fare charged was 5 cents.

Maintaining that its existing rates were not sufficient to yield a reasonable return, the company, November 16, 1926, applied to the Commission for authority to increase the basic fare to 7 cents in cash or $6\frac{1}{2}$ cents in tokens to be furnished by the company, four for 25 cents. The Commission, March 26, 1928, P.U.R.1928D, 75, made a report and by an order denied the application. A petition for rehearing was denied.

June 22, 1928, the company brought this suit to have the rates and order adjudged confiscatory and for temporary and permanent injunctions restraining the Commission from enforcing them. The city intervened as party defendant. The case came on for hearing before three judges on an application for temporary injunction. U. S. C. Tit. 28, § 380. Affidavits were submitted, a transcript of all the evidence before the Commission was received and the parties stipulated that thereon the case should be finally determined on the merits. The court found that the rates will not permit the company to earn a reasonable return and are confiscatory; and by its decree permanently enjoined the Commission from enforcing them.

The sole controversy is whether the company is bound by contract with the city to continue to serve for the fares

specified in the franchises—it being conceded that the finding below respecting the inadequacy of the 5-cent fare is sustained by the evidence. Appellants contend that at all times the city had power to establish rates by agreement and that the franchise provisions constitute binding contracts that are still in force. On the other hand the company maintains that the state never so empowered the city; and it insists that, if the power was given and any such contracts were made, they have been abrogated.

1. It is possible for a state to authorize a municipal corporation by agreement to establish public service rates and thereby to suspend for a term of years not grossly excessive the exertion of governmental power by legislative action to fix just compensation to be paid for service furnished by public utilities. *Detroit v. Detroit Citizens' Street R. Co.* (1902) 184 U. S. 368, 382, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Vicksburg v. Vicksburg Waterworks Co.* (1907) 206 U. S. 496, 508, 515, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; *St. Cloud Pub. Service Co. v. St. Cloud* (1924) 265 U. S. 352, 355, 68 L. ed. 1050, 44 Sup. Ct. Rep. 492. And where a city, empowered by the state so to do, makes a contract with a public utility fixing the amounts to be paid for its service, the latter may not be required to serve for less even if the specified rates are unreasonably high. *Detroit v. Detroit Citizens' R. Co.* *supra*, at p. 389. And, in such case, the courts may not relieve the utility from its obligation to serve at the agreed rates however inadequate they may prove to be. *St. Cloud Pub. Service Co. v. St. Cloud*, *supra*.

UNITED STATES SUPREME COURT

[1] This court is bound by the decisions of the highest courts of the states as to the powers of their municipalities. *Georgia R. & Power Co. v. Decatur* (1923) 262 U. S. 432, 438, 67 L. ed. 1065, P.U.R.1923E, 387, 43 Sup. Ct. Rep. 613. Our attention has not been called to any California decision, and we think there is none, which decides that the state legislature has empowered Los Angeles to establish rates by contract. This Court is, therefore, required to construe the state laws on which appellants rely. As it is in the public interest that all doubts be resolved in favor of the right of the state from time to time to prescribe rates, a grant of authority to surrender the power is not to be inferred in the absence of a plain expression of purpose to that end. The delegation of authority to give up or suspend the power of rate regulation will not be found more readily than would an intention on the part of the state to authorize the bargaining away of its power to tax. *Providence Bank v. Billings* (1830) 4 Pet. 514, 561, 7 L. ed. 939; *Railroad Commission Cases* (1886) 116 U. S. 307, 325, 29 L. ed. 636, 6 Sup. Ct. Rep. 334; *Freeport Water Co. v. Freeport* (1901) 180 U. S. 587, 599, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Stanislaus County v. San Joaquin & K. R. Canal & Irrig. Co.* (1904) 192 U. S. 201, 210, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; *Puget Sound Traction, Light & P. Co. v. Reynolds* (1917) 244 U. S. 574, 579, 61 L. ed. 1325, P.U.R.1917F, 57, 37 Sup. Ct. Rep. 705.

This court applied the established rule in *Home Teleph. & Teleg. Co. v. Los Angeles* (1908) 211 U. S. 265,

53 L. ed. 176, 29 Sup. Ct. Rep. 50. That company's franchise was granted under the Broughton Franchise Act which provided that every such franchise "shall be granted upon the conditions in this act provided and not otherwise." The city charter gave power to its council to fix charges for telephone service. The franchise stated that the rates should not exceed specified amounts. An ordinance prescribing lower rates was passed. The company brought suit for injunction against its enforcement on the ground that the ordinance violated the contract clause of the Constitution of the United States. The city insisted that it had not been empowered by the state to make such a contract, and this Court upheld its contention. It said (p. 273): "The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. . . . The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required." And dealing with the charter provision there relied on by the company the court said (p. 274): "The charter gave to the council the power 'by ordinance . . . to regulate telephone service and the use of telephones within the city, . . . and to fix and determine the charges for telephones and telephone service and connections.' This is an ample authority to exercise the governmental power . . . but entirely unfitted to describe the authority to contract.

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It authorizes command, but not agreement."

[2] Section 470 of the Civil Code (March 21, 1872) cited by appellants merely regulates procedure. Section 497 authorizes political subdivisions to grant authority for the laying of railroads in streets "under such restrictions and limitations" as they may provide. Stats. 1891, p. 12. This is too general. The clause in § 501 (Stats. 1903, p. 172) providing that the rate of fare in municipalities of the first class "must not exceed 5 cents" does not relate to the power to contract, and plainly has no application here because Los Angeles never belonged to that class.

[3] Section 1 of the Broughton Franchise Act¹ provides that franchises "shall be granted upon the conditions in this Act provided and not otherwise." The Act requires the sale of such franchises upon advertisement stating the character of the franchise or privilege proposed to be granted, but it nowhere expressly empowers the city to establish rates by contract. This Court in the Home Telephone Company Case, *supra*,

dealt with the quoted provision. It said (p. 275): "Here is an emphatic caution against reading into the act any conditions which are not clearly expressed in the act itself. . . . It cannot be supposed that the legislature intended that so significant and important an authority as that of contracting away a power of regulation conferred by the charter should be inferred from the act in the absence of a grant in express words. But there is no such grant." And, so far as concerns the matter under consideration, the Act was not expanded by the amendment of June 8, 1915. It authorizes grantors of such franchises to impose such additional terms and conditions "whether governmental or contractual in character" as in their judgment are in the public interest. This general language does not measure up to the rule earlier invoked here by Los Angeles and applied by this court in the Home Telephone Company Case, *supra*.

The appellants invoke provisions of the city charter which are printed in the margin.² But it requires no discussion to show that they are not suffi-

¹ Its first sentence, as originally enacted, read: "Every franchise or privilege to . . . construct or operate . . . railroads . . . along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by . . . governing or legislative body of any . . . city . . . shall be granted upon the conditions in this Act provided, and not otherwise." Stats. 1893, p. 288. The Act was amended in 1897 (Stats. 1897, pp. 135, 172); re-enacted in 1901 (Stats. 1901, p. 265) and 1905 (Stats. 1905, p. 777) and amended in 1909. Stats. 1909, p. 105. The first sentence has remained substantially the same. The amendment of June 8, 1915 (Stats. 1915, p. 1300) inserted immediately after this sentence: "The grantor may, however, in such franchise impose such other and additional terms and conditions not in conflict herewith, whether governmental or contractual in char-

acter, as in the judgment of the legislative body thereof are to the public interest."

² Art. I, § 2(25) (February 16, 1905) Stats. 1905, p. 994, providing that no franchise for use of public streets should be granted by the city except by a specified vote nor for a term of more than 21 years and that "Every grant . . . shall make adequate provision by way of forfeiture . . . or otherwise to secure efficiency of public service at reasonable rates and the maintenance of the property in good order throughout the term of the grant."

Art. I, § 2(30) (March 25, 1911) Stats. 1911, p. 2063: "The city . . . shall have the right and power: . . . to fix and determine the rates . . . for . . . the conveyance of passengers . . . by means of street railway . . . cars. . . . To regulate, subject to the provisions of the Constitution of the state of California, the

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cient to empower the city by contract to establish rates. In support of their claim, they cite *Columbus R. Power & Light Co. v. Columbus* (1919) 249 U. S. 399, 63 L. ed. 669, P.U.R. 1919D, 239, 39 Sup. Ct. Rep. 349, 6 A.L.R. 1648; *Opelika v. Opelika Sewer Co.* (1924) 265 U. S. 215, 68 L. ed. 985, P.U.R.1924E, 176, 44 Sup. Ct. Rep. 517; *St. Cloud Pub. Service Co. v. St. Cloud* (1924) 265 U. S. 352, 68 L. ed. 1050, 44 Sup. Ct. Rep. 492, and *Southern Utilities Co. v. Palatka* (1925) 268 U. S. 232, 69 L. ed. 930, P.U.R.1925D, 105, 45 Sup. Ct. Rep. 488. But the *Columbus Case*, *supra*, did not involve, and this Court did not there decide, the question of power. See p. 407 of 249 U. S. and 194 U. S. 517, 532, 534, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756. And in the other cases, we followed the decisions of the courts of the respective states.

[4] Appellants have failed to sustain their contention that the city was empowered to make such rate contracts.

2. But assuming that the fares were established by the franchise contracts we are of opinion that such contracts have been abrogated. The state had power upon the company's application, through its Commission or otherwise, to terminate them. *Pawhuska v. Pawhuska Oil & Gas Co.* (1919) 250 U. S. 394, 63 L. ed. 1054, P.U.R. 1919E, 178, 39 Sup. Ct. Rep. 526; *Trenton v. New Jersey* (1923) 262 U. S. 182, 186, 67 L. ed. 937, 43 Sup.

Ct. Rep. 534, 29 A.L.R. 1471; *Henderson Water Co. v. Corporation Commission* (1925) 269 U. S. 278, 70 L. ed. 273, P.U.R.1926B, 666, 46 Sup. Ct. Rep. 112; *Denney v. Pacific Teleph. & Teleg. Co.* (1928) 276 U. S. 97, 72 L. ed. 483, P.U.R.1928C, 408, 48 Sup. Ct. Rep. 223.

[5, 6] November 30, 1918, the company applied to have the Commission investigate its service and financial condition and for an order authorizing it to "so operate its system and change its rates that the income will be sufficient to pay the costs of the service." May 31, 1921, the Commission found that the existing fares would not permit the company to collect enough to enable it to provide adequate service. See 19 Cal. R. C. R. 980, P.U.R.1922A, 66, 90. And it made an order permitting a small increase. The company did not accept it, but applied for a rehearing. After several postponements the case was stricken from the calendar, and some years later the company asked that its application be dismissed. The Commission, October 18, 1926, granted the company's request and also revoked the order.

Shortly thereafter the company applied for a basic fare of 7 cents in cash or 6½ cents in tokens. The fares so proposed were substantially higher than those which were not accepted by the company. Again the Commission made extensive investigations. And March 26, 1928, P.U.R.1928D, 75, it filed a report which contained

construction and operation of . . . street railways.

Art. I, § 2(40), being § 2(25), *supra*, (as amended March 11, 1913) Stats. 1913, p. 1633: "The city . . . shall have the right and power: To grant franchises, . . .

for furnishing . . . transportation . . . or any other public service; to prescribe the terms and conditions of any such grant, and to prescribe by ordinance . . . the method of procedure for making such grants; . . ."

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findings as to the value of the property, operating revenues, operating expenses including cost of depreciation and taxes, amount available for return, average net income for five years ending with 1926, stated that the cost of operation might be reduced, and concluded that by reason of such facts the rates of fare charged by the company were not unreasonable and that the rates proposed would be unjust and unreasonable. And the Commission made an order denying the company's application.

There is no decision in the courts of the state as to the effect of the proceedings before and action taken by the Commission, and, therefore, we are required to construe the applicable provisions of the local constitution and statutes. *Denney v. Pacific Teleph. & Teleg. Co. supra*, at p. 101. Under the state Constitution, Art. XII, § 23, as amended November 3, 1914, and the Public Utilities Act of April 23, 1915, the Commission has exclusive power to regulate rates. And § 27 of the Act³ gave to street railway companies the right to charge more than 5 cents upon showing before the Commission that the higher charge is justified. No distinction is made between rates established by franchise contracts and those otherwise fixed. Fares may not be changed without approval of the

Commission. The policy of the state is that all rates shall be just and reasonable (§ 15) and the Commission is directed, whenever after hearing had upon its own motion or upon complaint it shall find that rates are unjust or insufficient, to determine the just and reasonable rates thereafter to be observed. § 32 (a).⁴ The language used in *Denney v. Pacific Teleph. & Teleg. Co. supra*, at p. 102, P.U.R. 1928C, at p. 412, is pertinent here. "The Department made its investigation and order without regard to the franchise rates and treated the questions presented as unaffected thereby. It exercised the power and duty to fix reasonable and compensatory rates irrespective of any previous municipal action. We must treat the result as a bona fide effort to comply with the local statute."

The proceedings before the Commission and its orders clearly show that it twice took jurisdiction to determine just and reasonable rates. Its order of May 31, 1921, P.U.R. 1922A, 66, by reason of the company's failure to put in the increased rates never became operative and finally was vacated. The report and order of March 26, 1928, P.U.R. 1928D, 75, found that existing rates were just and reasonable and in legal effect required the company to continue to observe them. The court below found the rates con-

³ Section 27 declares that fares of more than 5 cents shall not be charged on street railroads "except upon a showing before the Commission that such greater charge is justified; provided, that until the decision of the Commission upon such showing, a street . . . railroad . . . may continue to . . . receive the fare lawfully in effect on November 3, 1914. Stats. 1915, p. 131.

⁴ Section 32(a): "Whenever the Commission, after a hearing had upon its own mo-

tion or upon complaint, shall find that the rates . . . collected by any public utility . . . are unjust, unreasonable, discriminatory, or preferential, or in anywise in violation of any provision of law or that such rates . . . are insufficient, the Commission shall determine the just, reasonable, or sufficient rates . . . to be thereafter observed and in force, and shall fix the same by order as hereinafter provided." Stats. 1915, p. 132.

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fiscatory, and appellants do not here question that finding.

Decree affirmed.

Mr. Justice McREYNOLDS is of opinion that, as our finding that the city had no power to make rate contracts is sufficient to dispose of the case, it would be better not to take up the second point.

Mr. Justice BRANDEIS, dissenting: The railway claims that the Commission's refusal to authorize a fare higher than 5 cents confiscates its property. The city and the Commission do not insist here that the 5-cent fare is compensatory; and they concede that, since 1915, the latter has had jurisdiction to authorize a higher fare. They defend solely on the ground that the railway bound itself by contracts not to charge more; that these contract provisions are still in force, except as modified by the Act of 1915 empowering the Commission to authorize changes in the rate; that an alleged error of the Commission in refusing authority to charge more can be corrected only by proceedings brought in the supreme court of the state to compel the Commission to do its duty; and that the lower court's finding that the rate is noncompensatory is, therefore, immaterial.

The district court recognized that such contracts, if existing, would be a complete defense to this suit. *Columbus R. Power & Light Co. v. Columbus* (1919) 249 U. S. 399, 63 L. ed. 669, P.U.R.1919D, 239, 39 Sup. Ct. Rep. 349, 6 A.L.R. 1648; *Georgia R. & Power Co. v. Decatur* (1923) 262 U. S. 432, 67 L. ed. 1065, P.U.R.1923E, 387, 43 Sup. Ct. Rep. 613; *Opelika v. Opelika Sewer Co.*

(1924) 265 U. S. 215, 68 L. ed. 985, P.U.R.1924E, 176, 44 Sup. Ct. Rep. 517; *St. Cloud Pub. Service Co. v. St. Cloud* (1924) 265 U. S. 352, 68 L. ed. 1050, 44 Sup. Ct. Rep. 492; *Southern Utilities Co. v. Palatka* (1925) 268 U. S. 232, 69 L. ed. 930, P.U.R.1925D, 105, 45 Sup. Ct. Rep. 488, expressed a strong doubt whether the city ever had the power to contract concerning the rate of fare; and, declining to pass upon that question, granted the relief prayed for solely on the ground that any such contract right which existed had been abrogated.

The franchises under which the railway is operating are confessedly contracts. The words used concerning the rate of fare are apt ones to express contractual obligations. The railway contends, however, that the fare provisions were not intended to be contracts, and that, if they were so intended, they were not binding, because neither the city nor the county had the power to contract as to the rate of fare. It insists further that if the fare provisions were originally binding as contracts, they were abrogated in 1921 or 1928 by action of the Commission.

First. Most of the franchises were granted before the state had vested in the Commission power to regulate street railway rates or had expressly reserved to itself, otherwise, the power to change rates theretofore fixed by ordinance. This power of regulation was first expressly conferred upon the Commission in 1915, by amendments to §§ 13, 27, and 63 of the Public Utilities Act, Stats. 1915, p. 115, made pursuant to an amendment of § 23 of Article XII of the California

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Constitution adopted November 3, 1914. These enactments did not purport to abrogate any existing contract. Nor did they purport to take from the city or from the county any power theretofore possessed to make a contract concerning the rate of fare. Their effect was merely to make any such contract, whether theretofore or thereafter entered into, subject to change by the Commission. Unless and until so changed a contractual fare fixed by franchise remains in full force. *Henderson Water Co. v. Corporation Commission* (1925) 269 U. S. 278, 281, 282, 70 L. ed. 273, P.U.R. 1926B, 666, 46 Sup. Ct. Rep. 112. Consequently, it is not here claimed that these enactments alone abrogated the alleged contracts as to rate of fare.

Second. The railway contends, however, that the Commission abrogated the fare contracts by its action taken in 1921 pursuant to this legislation. The facts are these. In 1918, the railway asked the Commission to make an investigation of its service and its financial condition and for an order enabling it to so operate its system that the income would be sufficient to pay the cost of the service. In that application the railway expressly disclaimed any desire to increase its rate of fare, but about two years later, it made a supplemental application for leave to do so. On May 31, 1921, 19 Cal. R. C. R. 980, 1002, P.U.R. 1922A, 66, the Commission made a report in which it declared that an increase in the fare in some form should be granted; and that the railway be authorized "to file with the Commission and put into effect within thirty days from the date

of this order a schedule of rates increasing the present basic 5-cent fare to 6 cents," ten tickets for 50 cents. The railway did not file a schedule of fares. Instead, it moved for a rehearing. That motion was promptly set down for hearing by the Commission, but was never heard. For the railway asked first for an adjournment; then that its motion be stricken from the calendar; and finally, that an order be entered setting aside the decision made and dismissing the entire proceeding, including the application for increase of fare. This request of the railway was granted, the order of dismissal reciting that the authorization to increase the fare had "been suspended by virtue of the pendency of a petition for rehearing," as the statutes provided. Public Utility Act, § 66. Obviously, this action taken in 1921 cannot be deemed an abrogation or modification of any existing fare provision of the franchises, unless it be held that mere entry by the Commission upon an enquiry as to the rate of fare, as commanded by the statute, has that effect. Reason and authority are to the contrary.

Third. Nor did the action taken by the Commission in 1928, in the proceedings now under review, abrogate any existing fare provision. There also the Commission took jurisdiction, as it was by the statute required to do. It refused to authorize a higher fare, because it concluded that for the past five years the railway had been earning an average annual return of 7.1 per cent; that it was not being efficiently operated; that the management had failed to introduce certain economies previously recommended which

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would have increased its net earnings; and that for these reasons the existing 5-cent fare was just and reasonable. The Commission may have erred in its judgment, but it is clear that it did not change the rate of fare. In *Georgia R. & Power Co. v. Decatur* (1923) 262 U. S. 432, 439, 67 L. ed. 1065, P.U.R.1923E, 387, 43 Sup. Ct. Rep. 613, it was held that the assumption of jurisdiction by the Commission to the extent of affirmatively ordering the continuance of existing transfer privileges did not effect an abrogation of an existing contract provision relating thereto, since such action did not conflict with the terms of the contract. Compare *Los Angeles v. Los Angeles City Water Co.* (1900) 177 U. S. 558, 578-84, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Minneapolis, Chicago, M. & St. P. R. Co. v. Minneapolis Street R. Co.* (1910) 215 U. S. 417, 435, 54 L. ed. 259, 30 Sup. Ct. Rep. 118. In *Denney v. Pacific Teleph. & Teleg. Co.* (1928) 276 U. S. 97, 72 L. ed. 483, P.U.R.1928C, 408, 48 Sup. Ct. Rep. 223, the Commission had previously granted an increase in fare of which the company had availed itself.

Assuming that the railway was bound by contract to maintain a 5-cent fare, it could be relieved from its obligation only by the Commission. Had the Commission authorized an increase in fare, it would still be questionable whether the contract would have been thereby abrogated or only modified by making the Railway's obligation less onerous. Surely, the Commission's refusal to grant any help, because in its opinion none is needed, cannot have the anomalous

effect of entirely relieving the railway of its obligation.

Fourth. If the district court erred in holding that the action taken in 1921 and 1928 had the effect of abrogating any existing contract, there must be a determination whether such contracts did exist, in fact and law. It was assumed by the district court and by counsel in this Court that if the city lacked the power to bind itself contractually by the fare provisions, the railway could not be bound thereby. This conclusion is not commanded by logic or by the law of contracts. Lack of power in the municipality to bind itself is a factor to be considered in determining whether the parties intended to enter into a contract. But, if they did, the railway's promise need not fail for lack of mutuality. The law does not require that a particular contractual obligation must be supported by a corresponding counter-obligation. It is conceded that the city possessed the power to enter into the franchise contract. The contention is merely that it could not surrender its power to regulate rates. But there is nothing in the fare provisions to indicate that the city attempted to do that. These provisions in terms bind only the railway. The railway unquestionably had power to agree to charge a fixed fare. The grant of the franchise is sufficient consideration, if so intended, for any number of contractual obligations which the railway may have chosen to assume. In *Southern Iowa Electric Co. v. Chariton* (1921) 255 U. S. 539, 65 L. ed. 764, P.U.R. 1921D, 275, 41 Sup. Ct. Rep. 400, a case coming from Iowa, it was held, following Iowa decisions, that since

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the city lacked power to bind itself, there was no contract. And there is a statement to that effect in *San Antonio v. San Antonio Pub. Service Co.* (1921) 255 U. S. 547, 556, 65 L. ed. 777, P.U.R.1921D, 412, 41 Sup. Ct. Rep. 428. But in *Southern Utilities Co. v. Palatka* (1925) 268 U. S. 232, 233, 69 L. ed. 930, P.U.R.1925D, 105, 45 Sup. Ct. Rep. 488, the question was expressly left open. Obviously, that is a matter of state law on which the decisions of this Court are not controlling.

Fifth. If it be true that the railway is not bound by the fare provisions, unless the city had power to bind itself in that respect, it is necessary to determine whether the city had that power and whether the parties did in fact contract as to the rate of fare. Whether the city had the power is, of course, a question of state law. In California, the Constitution and the statutes leave the question in doubt. Counsel agree that there is no decision in any court of the state directly in point. They reason from policy and analogy. In support of their several contentions they cite, in the aggregate, 30 decisions of the California courts, 15 statutes of the state, besides 3 provisions of its code and 7 provisions of its Constitution. The decisions referred to occupy 308 pages of the official reports; the sections of the Constitution, code, and statutes, 173 pages. Moreover, the 102 franchises here involved were granted at many different times between 1886 and 1927. And during that long period, there have been amendments both of relevant statutes and of the Constitution. The city or the county may have had the power

to contract as to the rate of fare at one time and not at another. If it is held that the city or the county ever had the power to contract as to rate of fare, it will be necessary to examine the 102 franchises to see whether the power was exercised. It may then be that some of the franchises contain valid fare contracts, while others do not. In that event, the relief to be granted will involve passing also on matters of detail.

In my opinion, these questions of statutory construction, and all matters of detail, should, in the first instance, be decided by the trial court. To that end, the judgment of the district court should be vacated and the case remanded for further proceedings, without costs to either party in this Court. Pending the decision of the trial court an interlocutory injunction should issue. Compare *Hammond v. Schappi Bus Line* (1927) 275 U. S. 164, 72 L. ed. 218, P.U.R. 1928A, 388, 48 Sup. Ct. Rep. 66; *Hammond v. Farina Bus Line & Transp. Co.* (1927) 275 U. S. 173, 72 L. ed. 222, P.U.R.1928A, 382, 48 Sup. Ct. Rep. 70; *Ohio Oil Co. v. Conway* (1929) 279 U. S. 813, 73 L. ed. —, 49 Sup. Ct. Rep. 256. It is a serious task for us to construe and apply the written law of California. Compare *Gilchrist v. Interborough Rapid Transit Co.* (1929) 279 U. S. 159, 207-209, 73 L. ed. —, P.U.R. 1929B, 434, 49 Sup. Ct. Rep. 282. To "one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books."

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Diaz v. Gonzalez (1923) 261 U. S. 102, 106, 67 L. ed. 550, 43 Sup. Ct. Rep. 286. This Court is not peculiarly fitted for that work. We may properly postpone the irksome burden of examining the many relevant state statutes and decisions until we shall have had the aid which would be afforded by a thorough consideration of them by the judges of the district court, who are presumably more familiar with the law of California than we are. The practice is one frequently followed by this Court.¹

In the case at bar, there are persuasive reasons for adopting the

course suggested. The subject matter of this litigation is local to California. The parties are all citizens of that state and creatures of its legislature. Since the railway denies that there ever was a valid contract governing the rate and asserts that if any such existed they have been abrogated, the contract clause of the Federal Constitution is not involved. The alleged existence of contracts concerning the rate of fare presents the fundamental issue of the case. Whether such contracts exist, or ever existed, depends wholly upon the construction to be given to laws of the State. Upon

¹ This course was pursued in the following, among other cases, in which a lower Federal Court erroneously left undecided a question of local law or of its application, *Gainesville v. Brown-Crummer Investment Co.* (1928) 277 U. S. 54, 61, 72 L. ed. 781, 48 Sup. Ct. Rep. 454; *Hammond v. Schappi Bus Line*, *supra*; *Hammond v. Farina Bus Line & Transp. Co.* *supra*; *Wilson Cypress Co. v. Del Pozo y Marcos* (1915) 236 U. S. 635, 656, 7, 59 L. ed. 758, 35 Sup. Ct. Rep. 446, in the following cases in which the lower court erroneously left undetermined a question of fact, *Security Mortgage Co. v. Powers* (1928) 278 U. S. 149, 159, 73 L. ed. —, 49 Sup. Ct. Rep. 84; *United States v. Magnolia Petroleum Co.* (1928) 276 U. S. 160, 164, 5, 72 L. ed. 509, 48 Sup. Ct. Rep. 236; *United States v. Brims* (1926) 272 U. S. 549, 553, 71 L. ed. 403, 47 Sup. Ct. Rep. 169; *Gerdes v. Lustgarten* (1924) 266 U. S. 321, 69 L. ed. 309, 45 Sup. Ct. Rep. 107; *Chastleton Corp. v. Sinclair* (1924) 264 U. S. 543, 548, 68 L. ed. 841, 44 Sup. Ct. Rep. 405; *Vitelli & Son v. United States* (1919) 250 U. S. 355, 359, 63 L. ed. 1028, 39 Sup. Ct. Rep. 544; *Southern P. Co. v. Bogert* (1919) 250 U. S. 483, 494, 497, 63 L. ed. 1099, 39 Sup. Ct. Rep. 533; *Union P. R. Co. v. Weld County* (1918) 247 U. S. 282, 287, 62 L. ed. 1110, 38 Sup. Ct. Rep. 510; *Marconi Wireless Teleg. Co. v. Simon* (1918) 246 U. S. 46, 57, 62 L. ed. 568, 38 Sup. Ct. Rep. 275; *Owensboro v. Owensboro Waterworks Co.* (1903) 191 U. S. 358, 372, 48 L. ed. 217, 24 Sup. Ct. Rep. 82; *Chicago, M. & St. P. R. Co. v. Tompkins* (1900) 176 U. S. 167, 180, 44 L. ed. 417, 20 Sup. Ct. Rep. 336, in the following cases in which the circuit court of appeals did not review the merits because of an erroneous view of the jurisdiction of the district court, *Guardian Savings & Trust Co. v. Road*

Improv. Dist. (1925) 267 U. S. 1, 7, 69 L. ed. 487, 45 Sup. Ct. Rep. 201; *Brown v. Fletcher* () 237 U. S. 583, 586-8, 59 L. ed. 1128, 35 Sup. Ct. Rep. 750; cf. *Louie v. United States* (1921) 254 U. S. 548, 551, 65 L. ed. 399, 41 Sup. Ct. Rep. 188, in the following cases in which the circuit court of appeals restricted its review because it erroneously regarded the action as one at law instead of a suit in equity, *Twist v. Prairie Oil & Gas Co.* (1927) 274 U. S. 684, 692, 71 L. ed. 1297, 47 Sup. Ct. Rep. 755; *Liberty Oil Co. v. Condon Nat. Bank* (1922) 260 U. S. 235, 245, 67 L. ed. 232, 43 Sup. Ct. Rep. 118, in the following cases in which the circuit court of appeals erroneously narrowed the scope of its review for other reasons, *Krauss Bros. Lumber Co. v. Mellon* (1928) 276 U. S. 386, 394, 72 L. ed. 620, 48 Sup. Ct. Rep. 358; *National Brake & Electric Co. v. Christensen* (1921) 254 U. S. 425, 432, 65 L. ed. 341, 41 Sup. Ct. Rep. 154; in the following cases in which the state court placed its decision on an erroneous view of Federal law, and, therefore, did not consider the questions of local law involved, *Chicago & N. W. R. v. Durham Co.* (1926) 271 U. S. 251, 257-8, 70 L. ed. 931, 46 Sup. Ct. Rep. 509; *Sioux City Bridge Co. v. Dakota County* (1923) 260 U. S. 441, 445-7, 67 L. ed. 340, 43 Sup. Ct. Rep. 190; *Ward v. Love County* (1920) 253 U. S. 17, 25, 64 L. ed. 751, 40 Sup. Ct. Rep. 419. In all of these cases, this Court recognized its undoubted power to decide the matters erroneously left undetermined by the courts below; but it preferred to remand the cases for further proceedings, either on the ground that the determination of the undecided issues was too burdensome a task, or on the ground that those issues should more appropriately be decided, in the first instance, by the lower courts.

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these questions, the decision of the supreme court of California would presumably have been accepted by this Court, if the case had come here on appeal from it. Compare *Georgia R. & Power Co. v. Decatur* (1923) 262 U. S. 432, 438, 67 L. ed. 1065, P.U.R. 1923E, 387, 43 Sup. Ct. Rep. 613; *Appleby v. New York* (1926) 271 U. S. 364, 380, 70 L. ed. 992, 46 Sup. Ct. Rep. 569.

The constitutional claim of confiscation gave jurisdiction to the district court. We may be required, therefore, to pass, at some time, upon these questions of state law. And we may do so now. But the special province of this Court is the Federal law. The construction and application of the Constitution of the United States and of the legislation of Congress is its most important function. In order to give adequate consideration to the adjudication of great issues of government, it must, so far as possible lessen the burden incident to the disposition of cases, which come here for review.²

Mr. Justice Holmes joins in this opinion.

Mr. Justice STONE, dissenting: I agree with Mr. Justice Brandeis that this case should have been disposed of by remanding it to the district court of three judges for determination whether the railway company, under its 102 franchises, or any of them, is bound by contract to maintain a 5-cent fare. That question is, I think,

different from the one presented in *Home Teleph. & Teleg. Co. v. Los Angeles* (1908) 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50, and involved in *Detroit v. Detroit Citizens' Street R. Co.* (1902) 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Vicksburg v. Vicksburg Waterworks Co.* (1907) 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762, whether the city had the requisite legislative authority to bind itself not to reduce the rate of fare fixed by the franchise. Here concededly the power to regulate rates is reserved to the State Commission and the question preliminary to the whole case is whether the railroad company has bound itself to serve for a 5-cent fare. I know of no principle of the law of contracts, *qua* contracts, which would preclude its doing so, even though the city had no power to obligate itself to maintain any particular rate. It has not purported to exercise such power by so contracting. It had power to grant franchises and the grant of the franchise without more would be good consideration for the company's undertaking to maintain a 5-cent fare. *Williston on Contracts*, §§ 13, 140.

The provision of the statute of March 1, 1913, enacted after the decision in *Home Teleph. & Teleg. Co. v. Los Angeles*, *supra*, authorizing the city to grant franchises and "to prescribe the terms and conditions" of the grant, and that of the act of June 8, 1915, authorizing the grantor of the franchise to impose terms and conditions "whether governmental or contractual in character," to quote no others, would seem to permit the city to acquire by the mere grant of the franchise, without other obligation on

² Compare "Distribution of Judicial Power between the United States and State Courts," by Felix Frankfurter, XIII *Cornell Law Quarterly*, 499, 503; "The business of the Supreme Court at October Term 1928," by Frankfurter and Landis, XLIII *Harvard Law Review*, 33, 53, 56, 59-62.

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its part, such contractual undertakings on the part of the railroad company as did not contravene the public interest.

If there be any public policy forbidding the company so to bind itself or forbidding the city to take advantage of the undertaking so given and acquired, it is one peculiar to local law, having its origin in local history and conditions, and so is peculiarly an appropriate subject for consideration, in the first instance, by the court of the district.

But as the Court, without dealing with this aspect of the matter, has held that the railway company is not so bound, it is unnecessary to decide that the State Railroad Commission's refusal to raise the rate would have been enough to abrogate the contract, if there had been one, and the practice of the Court not to pass on questions of constitutional or state law not necessary to a decision should, I think, be scrupulously observed. Even if necessary to decide the question, I would not be prepared to say that the refusal of the Commission to fix a fare different from the contract rate would destroy the contract. By contracting for a 5-cent fare, the railway company waived the protection of the

due process clause of the Fourteenth Amendment. *Columbus R. Power & Light Co. v. Columbus* (1919) 249 U. S. 399, 63 L. ed. 669, P.U.R. 1919D, 239, 39 Sup. Ct. Rep. 349, 6 A.L.R. 1648; *Southern Iowa Electric Co. v. Chariton* (1921) 255 U. S. 539, 542, 65 L. ed. 764, P.U.R. 1921D, 275, 41 Sup. Ct. Rep. 400; *Paducah v. Paducah R. Co.* (1923) 261 U. S. 267, 272, 67 L. ed. 647, P.U.R.1923C, 309, 43 Sup. Ct. Rep. 335; *Georgia R. & Power Co. v. Decatur* (1923) 262 U. S. 432, 438, 67 L. ed. 1065, P.U.R.1923E, 387, 43 Sup. Ct. Rep. 613; *Henderson Water Co. v. Corporation Commission* (1925) 269 U. S. 278, 281, 70 L. ed. 273, P.U.R.1926B, 666, 46 Sup. Ct. Rep. 112. Granting that the contract was subject to the power and duty of the Commission to modify it by changing the rate, that power has not been exercised and the duty is one arising, not under the Constitution and laws of the United States, but is imposed by state statute, for breach of which a state remedy alone should be given. See *Henderson Water Co. v. Corporation Commission*, *supra*, at p. 282 (compare *Corporation Commission v. Henderson Water Co.* (1925) 190 N. C. 70, 128 S. E. 465).

NEW YORK DEPARTMENT OF PUBLIC SERVICE
STATE DIVISION, PUBLIC SERVICE COMMISSION

Re Tappan & Nyack Bus Incorporated

[Case No. 5619.]

Monopoly and competition — Motor carriers — Surrender of rights.

An existing domestic carrier corporation which, by transferring its stock

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and operating rights to a foreign corporation in violation of domestic law, has divested itself of all power to operate a line for which it still holds a bare certificate, is not entitled to protection from competition by an applicant seeking to establish more adequate service over the same route.

[July 25, 1929.]

APPPLICATION of a bus carrier for a certificate of convenience and necessity; granted.

APPEARANCES: B. Meredith Langstaff, New York city, appearing for the petitioner; G. R. James, Assistant General Solicitor, New York city, appearing for the Erie Railroad Company; E. W. Hofstatter (by J. J. Howe), Suffern, appearing for Public Service Interstate Transportation Company, Incorporated.

VAN NAMEE, Commissioner: This is an application made by the Tappan and Nyack Bus Incorporated, a domestic corporation, for a certificate of convenience and necessity for the operation of a motor bus line between the village of Upper Nyack and the hamlet of Tappan, Rockland county, over the following route, as described in the petition herein:

Commencing in Upper Nyack on North Broadway at a point about Castle Heights avenue, running south along Upper Broadway through Nyack and through South Nyack to Cornelison avenue; east on Cornelison to the River road (known also as Piermont avenue), south on Piermont avenue through Grand View-on-Hudson, through Piermont on Main street (known also as the River road), southwesterly to Sparkill; northwesterly to Kings highway; southwesterly along Kings highway to Tappan; westerly on Westwood road to Summit avenue; south on

Summit avenue to New York-New Jersey State line; and return over the same route.

The route is thus entirely within the state of New York, and passes through and is designed to furnish service to the villages of Upper Nyack, Nyack, South Nyack, Grand View-on-Hudson, and Piermont, and the hamlets of Sparkill and Tappan in the town of Orangetown. The length of the route is approximately seven and four-tenths miles.

Consents to the proposed operation were granted by the town of Orangetown and the village of Grand View-on-Hudson on March 8, 1929, and April 12, 1929, respectively. These are the only municipalities whose consents are required, it appearing that none of the other municipalities affected have brought themselves under the operation of §§ 66 and 67 of the Transportation Corporations Law.

Hearings upon this application were held before me at the New York office of the Commission on May 27, June 4, June 11, and June 24, 1929, the appearances being as hereinbefore stated. After the close of the hearings an opportunity was afforded for the filing of briefs. These briefs have now been filed.

The petitioner proposes to operate the bus route, hereinbefore described, with three standard Mack busses with

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a seating capacity of twenty-nine passengers each. These busses are to be either new busses or reconditioned busses with new car guarantees, and are to be housed in a rented garage in the village of Nyack. The petitioner states that if the present application is granted, the petitioner will in all respects comply with the orders of the Commission with reference to such busses and the operation thereof.

At the beginning of its operation, the petitioner proposes to operate the route on a half-hour schedule, with extra service during the rush hours. It appears that it would require two busses to furnish the half-hour service, and that the third bus would be used for the purpose of furnishing the rush hour service. The petitioner states that the schedule will be increased later to a 15-minute schedule, as the public demand may require, in which event it, of course, would be necessary to provide additional equipment. From the attitude of the petitioner on the hearing herein, I am confident that additional equipment would be provided as needed.

The rate of fare which the petitioner proposes to charge is as follows:

Between Upper Nyack and Nyack, 5 cents; between Nyack and Grand View-on-Hudson, at the Y. W. C. A. Camp, 5 cents; between Grand View-on-Hudson and Piermont, 5 cents; between Piermont and Sparkill, 5 cents; between Sparkill and Tappan, 5 cents.

The management of the corporation is to be in the hands of Messrs. Morris Beck and Solomon Goldstein, both of whom are investing their own money in the enterprise and both of whom are to take an active part in the

operation of the line. It should be added that both of these men have had several years actual experience in and in connection with the operation of bus lines in New Jersey and New York, including a line which seems to have been operated in part over the same route involved in this proceeding. This latter line will be more fully referred to later.

I think that the financial ability of the petitioner may properly be regarded as adequate for the operation of the proposed route. The capitalization of the petitioner as provided in its certificate of incorporation is \$10,000 to consist of 100 shares of the par value of \$100 each. The entire amount has been subscribed for, most of it by Messrs. Beck and Goldstein, who have already advanced \$1,000. While Messrs. Beck and Goldstein are not actually in possession of the remainder of the money which will be required for taking care of their subscriptions, the testimony indicates that the money is available. In addition, the corporation will have the backing of Mr. Samuel Goldstein, the father of Solomon Goldstein, who seems to be a man of sufficient financial responsibility to take care of the needs of the corporation over and above the \$10,000 referred to.

Upon the question of public convenience and necessity, it seems hardly necessary to go into great detail, it appearing that the convenience and necessity of a bus line through this section of country and over the same or practically the same route involved in this proceeding, has already been passed upon by this Commission in Cases Nos. 864, 3028, and 4266, decided respectively April 25, 1923,

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April 28, 1926, and August 17, 1927, as the result of which a certificate of convenience and necessity for the operation of such line was granted to or became vested in Northern Valley Bus Line, Incorporated, a New York corporation (which corporation no longer operates the line). Further evidence of the necessity of the proposed operation is shown by the fact that the various villages and hamlets through which the line passes have grown considerably since the aforesaid cases were decided, so that if a line was necessary then, it naturally would be necessary now.

It appears that the corporate name of Northern Valley Bus Line, Incorporated, above referred to, has been changed to "Public Service Interstate Transportation Company, Incorporated," and on the hearing herein said company, under its changed name, appeared in opposition, the ground of its opposition being that a certificate of convenience and necessity has already been granted to it for the operation of substantially the same route (see cases above referred to). But it appears that said corporation no longer operates the route, and it has no employees and apparently no property with which to operate it. Some time ago all the stock of said corporation passed into the hands of Mr. T. Wilson Van Mittelsworth, who is the treasurer of Public Service Co-ordinated Transport, a New Jersey corporation, and thereupon in some way the operation of the line was turned over to said Public Service Co-ordinated Transport which is now operating the line. This latter corporation has no certificate of convenience and necessity for the operation of the line.

While apparently the stock of the New York corporation has not been actually turned over to the New Jersey corporation, and the certificate of convenience and necessity of the New York corporation is still vested in that corporation, the situation apparently is that the stock of the New York corporation is being held by Mr. Van Mittelsworth in trust for the New Jersey corporation, and the only function performed by the New York corporation is to act as the naked holder of the title to the certificate of convenience and necessity. It should be added that the record shows that the service afforded by the New Jersey corporation has not been satisfactory, and that for a time the area involved in the present proceeding was deprived almost entirely of the service of local busses, such local service as was furnished being furnished chiefly by certain through interstate busses operated by said corporation, which busses were insufficient to take care of both interstate and local business; and although the service of local busses was subsequently restored, the record indicates that the restoration of such service was not effected voluntarily but only "under prod of anticipated competition." (Re Citizens Electric Service Co. 1 P. S. C. R. (2d Dist. N. Y.) 336, 344). As the New York corporation is not operating the line, and apparently has divested itself of all power to operate the line and as the actual operations that are now being conducted by the New Jersey corporation are being conducted in violation of law with the knowledge and consent and connivance of the New York corporation, it does not seem to me that the New

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York corporation (Public Service Interstate Transportation Company, Incorporated) is entitled to much consideration when it seeks to exclude the petitioner herein on the alleged ground of competition.

On the hearing the Erie Railroad Company, which traverses this area, appeared and opposed the application on the ground that the proposed bus line would compete with the railroad. But this objection was passed upon adversely to the railroad company in the previous cases above referred to. That this is so seems to be conceded by counsel for the company, who, however, contends that the determination then made is not conclusive here, for the reason that if the proposed application is granted, the result will be the operation of two bus lines instead of one. But this contention loses sight of the fact that the certificate which was granted as the result of the previous cases, is not being used, and

probably will not be used, and that the operations now being conducted by the New Jersey corporation above referred to, namely, Public Service Co-ordinated Transport, are being conducted in violation of law and cannot be recognized by the Commission. From a legal point of view, the situation is the same as if no bus line were being operated through the locality in question. In view of the topography of the country and the inaccessibility of certain stations on the Erie road, I think that this is a case where the operation of a bus line should be permitted even though it may result in some competition with the railroad.

I recommend that the application be granted and I submit herewith draft of certificate accordingly.

Chairman Prendergast and Commissioner Lum concur; Commissioners Pooley and Brewster not present.

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L. S. Caple et al.

v.

Interstate Utilities Company et al.

[Case No. 884, Order No. 1175.]

Contracts — Cancellation — Notice.

1. Where provision is made that a contract may be canceled by written notice, the giving of such notice cancels the contract *in toto*, but a notice to change one certain provision is of no effect unless agreed to by the other contracting party, p. 21.

Rates — Contracts — Commission jurisdiction.

2. The Commission, under the police power of the state, may change the

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rate provided in a contract, but its power to do so is only after a hearing, upon a finding that the rates in the contract are unreasonable and a finding as to what rates are reasonable, p. 21.

[June 17, 1929.]

COMPLAINT by the president of a rural telephone company and others against an interstate telephone company protesting certain rate increases by the latter; complaint sustained.

By the COMMISSION: The matter, first above mentioned, was instituted by complaint in letter form by the Carlin Bay Telephone Company, per L. S. Caple, president of said company, dated October 4, 1926, protesting for said Carlin Bay Telephone Company and the other rural telephone lines connecting with the Interstate Utilities Company at its Harrison Exchange at Harrison, Idaho, against a raise from 50 cents to 75 cents per telephone per month, for connection with the said Interstate Utilities Company's Harrison Exchange, and asking for a refund, or credit, for charges assessed against the rural telephone companies, or lines, for charges assessed at a 75-cent rate about October 1, 1926.

On January 5, 1927, the secretary of this Commission took up, by letter, with the Interstate Utilities Company "the withholding the presentation of this new rate for a short time until we can get to this without the Commission taking formal action to the extent of suspending the rate."

Under date of January 10, 1927, the Interstate Utilities Company, through its agent C. E. Hartigan, supervisor of rates of said company, replied: "We are very glad to follow your suggestion and will not present any new rates until this matter is adjusted."

At the hearing, herein, on July 17,

1928, Mr. John F. Davies stated: "We are prepared to enter our justification of the other rate and they may attack it in any form they desire."

Hearing upon said protest was adjourned from time to time, sometimes at the request of the Commission and sometimes at the request of the Interstate Utilities Company, but with the understanding that the advance from 50 cents to 75 cents should be investigated and an order made by this Commission fixing the same in accordance with the evidence produced by the parties thereto.

The protestants consist of some five rural or mutual companies or lines connecting with applicant's exchange at Harrison, Idaho, as follows: Carlin Bay Telephone Company; Harrison Flats Rural Telephone Company, a corporation; Harrison Flats Rural Telephone Company, a co-partnership; East Point Telephone Company, and Thompson Lake Telephone Company.

Appearances: Mrs. L. S. Caple, for the Carlin Bay Telephone Company; Everett E. Hunt and Ed. S. Elder, of St. Maries, Idaho, appearing on behalf of protestants; Harrison Flats Rural Telephone Company, a corporation, Harrison Flats Rural Telephone Company, a co-partnership, East Point Telephone Company, and Thompson Lake Telephone Company; John F. Davies, Spokane, Wash-

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ington, on behalf of Interstate Utilities Company and Standard Telephone Company of Illinois.

On March 7, 1925, applicant (sometimes herein referred to as respondent), Interstate Utilities Company, filed with this Commission a petition and a supplement to standard exchange rates, dated March 4, 1925, in which it is recited:

"This company has in all of its contracts entered into during the said period of five years made a rate of 75 cents per month per phone in all the territory operated in north of a line constituting the southern boundary of the St. Joe National Forest, and in the section south of said line has made a rate of 50 cents subject however to the filing of rates of the Clearwater Telephone Company and of the contracts existing in certain properties acquired by purchase and of which the Public Utilities Commission of the state of Idaho has been advised. This company submits that said rate of 75 cents per month per locally owned phone, while it is not an adequate rate, should be a minimum rate for such service in such districts and that 50 cents per month per locally owned phone, while not an adequate rate, should be the established rate in its district south of line constituting the southern boundary of the St. Joe National Forest, and it, therefore, requests leave to file the attached schedule of rates *subject to the contracts now in force and effect in such respective districts*. The petitioner further says the filing of said rates is *merely the standardizing of its rates and not the establishment of a new rate*, but a compliance with the law to have its rates publicly filed."

The contracts in force at the time (1925) and not terminated by notice as provided in said written agreements, are still in force and effect. They were entered into by applicant (sometimes herein referred to as respondent), Interstate Utilities Company and two of these protestants rural companies, in writing, and apparently entered into by verbal contracts between said Interstate Utilities Company and the other rural lines herein appearing, in which the 50-cent rate is adopted, and are set forth in the evidence in this hearing. They are apparently the contracts especially excepted from the applicant's petition above referred to dated March 4, 1925, and filed March 7, 1925.

In the application, dated March 4, 1925, we find this statement:

"That from the inception of this telephone company and its predecessors, various rates have been charged for such telephone service. That service of such character is, however, handled by contract either with an organization consisting of the telephone subscribers on such respectively locally owned lines, and on rare occasions with individual subscribers on such locally owned lines. A good many of such contracts continue from year to year, and are so written that they continue in effect until canceled in writing by one or the other of the parties thereto."

The written contracts introduced in this case provide:

"This agreement . . . shall continue in force for a period of one year, and thereafter until the expiration of thirty days after written notice of intention to terminate the same is given by either party to the other."

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Applicants admit that no such notice has ever been given.

By agreement made at the hearing herein, the matter of the justification of the rates proposed in Tariff No. 2 of the Interstate Utilities Company and the Standard Telephone Company of Illinois (Testimony on pages 4 and 5 of Transcript) will now be considered.

On September 18, 1926, the protestants were advised that beginning October 1, 1926, the charges for connection of the rural lines would be advanced 25 cents per month, or from 50 cents to 75 cents per month per telephone. This was not a 30-day notice in writing, as provided for in the written contracts herein referred to.

On April 29, 1927, applicant filed with this Commission its schedule of rates proposed in Tariff No. 2 of said Public Utilities Commission, included in which schedule were monthly service connection switching charges for locally owned rural lines having switching connection with the applicant's Harrison Exchange of 75 cents. Included in the same filing were designated charges of 50 cents per month for like service in applicant's exchange at Moscow, Idaho.

The service, for which the petitioner seeks to establish the above described rates, is defined as follows:

"Where the subscriber for telephone service owns his own instrument and the lines connecting thereto at the respective exchange limits from which he receives the service."

It must be observed that the rates sought to be filed by said petitioner, and to become effective, are such rates as cannot become effective subject to

§ 2427 of the Idaho Compiled Statutes, 1919, without a hearing and a determination thereon. Section 2427 provides as follows:

"No public utility shall, as to rates, charges, service, facilities or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. The Commission shall have the power to determine any question of fact arising under this section."

[1] It is fundamental that a notice to change one certain provision in the contract is of no effect whatever, unless agreed to by the other contracting party. Where provision is made that a contract may be canceled by written notice, the giving of such notice cancels the contract *in toto*.

[2] The Commission under the police power of the state may change the rate provided in a contract, but its power to do so is only after a hearing, and upon a finding that the rates in the contract are unreasonable, and a finding as to what rates are reasonable. It is our opinion that the rates in a contract cannot be changed in any other manner.

Upon the filing of said schedule of rates proposed in Tariff No. 2, notice was given to the Carlin Bay Telephone Company; Harrison Flats Rural Telephone Company, a corporation; Harrison Flats Telephone Company, a co-partnership; East Point Telephone Company; and Thompson

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Lake Telephone Company. Hearing was set and held at Harrison, Idaho, on the 17th day of July, 1928, and evidence at said Harrison hearing was submitted as to the Harrison Exchange only, and those parties being furnished said service from the Harrison Exchange.

It appears from the evidence adduced at the Harrison hearing, that Harrison is north of the southern boundary line of the St. Joe National Forest, and that the contract rates at Harrison are 50 cents per month per phone, and that the above quoted facts allege in the petition that the company in all its contracts entered into during said period of five years, made a rate of 75 cents per month per phone in all of the territory operated in north of the line approximately constituting the southern boundary of the St. Joe National Forest, is not sustained by the evidence submitted at the Harrison hearing.

After a full consideration of all of the facts involved in this case, the Commission finds:

1. That there are certain contracts outstanding and in effect between the applicant, Interstate Utilities Company, and the complainant herein and certain other locally owned rural lines having switching connections with the applicant's Harrison Exchange, which

contracts provide for a monthly switching charge of 50 cents.

2. That the rates for switching services at said Harrison Exchange of the applicant company, filed by said applicant company under date of March 4, 1925, and under date of April 29, 1927, or at any other dates, do not abrogate the provisions of said contracts nor can they do so until found reasonable, just and lawful by this Commission.

3. That said filings referred to in Finding No. 2 herein, are in contravention of § 2427 of the Idaho Compiled Statutes of 1919.

It is therefore *ordered*, that the applicant, Interstate Utilities Company, continue to serve the complainants in the matter of the monthly switching connection charge at 50 cents until such rate is lawfully changed; and

It is *further ordered*, that all charges heretofore made and collected by the applicant, Interstate Utilities Company, in excess of 50 cents per month for said service, rendered to said complainants, be remitted; and that all charges heretofore made on the books of the applicant company in excess of 50 cents per month for said service, rendered to said complainants, be canceled and that the applicant, Interstate Utilities Company, take nothing therefor.

RE PACIFIC GAS & ELECTRIC CO.
CALIFORNIA RAILROAD COMMISSION

Re Pacific Gas & Electric Company

[Decision No. 21511, Application No. 15676.]

Commissions — Jurisdiction — Interpretation of contract.

It is not incumbent upon the Commission to determine whether a contract between two utilities for the sale of gas to one by the other covers only wholesale manufactured gas or is binding for the service of wholesale natural gas.

[September 3, 1929.]

APPPLICATION of a gas and electric company for a certificate of convenience and necessity to construct and operate a natural gas plant; authority granted.

APPEARANCES: C. P. Cutten, for applicant; Thelen and Marrin, for Western Natural Gas Company; R. L. Vaughan, for Coast Counties Gas & Electric Company; E. L. Schary, for Consumers Gas Company.

WHITSELL, Commissioner: In this application, Pacific Gas & Electric Company, applicant, refers to and incorporates therein its Application No. 15602, and alleges that, in addition to the proposed pipe lines and project for the transmission of natural gas covered by Application No. 15602, it purposes to lay, install, and maintain a pipe line for the transportation of natural gas from a point in section 7, township 16 south, range 14 east, M. D. B. and M., in Fresno county, and at the junction of the 20-inch and 22-inch sections of the line described in Application No. 15602, to a point near the city of Richmond, said line to traverse the counties of Fresno, Merced, Stanislaus, San Joaquin, and

Contra Costa; that said line is to be 20 inches in diameter, approximately 162 miles long, and to have a delivery capacity of 60,000,000 cubic feet of natural gas per day, without compression, which delivery capacity could be increased to 125,000,000 cubic feet per day by the installation of compressor stations.

Applicant further alleges that said pipe line will be connected to its Oakland-Milpitas natural gas transmission system by a 20-inch line from Richmond to its gas station "B" in Oakland, thereby providing an additional natural gas supply to applicant's east bay territory.

Applicant further alleges that it purposes to construct, install, and maintain, from a point on its said main line gas transmission line near Crow's landing in Stanislaus county, a branch line 12½ inches in diameter and 50 miles in length extending northeasterly to Modesto, and thence northly to Stockton in San Joaquin

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county; the delivery capacity of said branch line to be 15,000,000 cubic feet of natural gas per day.

Applicant also alleges that this natural gas transmission line project will be built mainly on private rights of way, but that if applicant shall find it necessary or convenient to occupy or use any of the public roads in the counties through which it is proposed to build the same, the right to the use and occupancy of which it does not now have, it will obtain the necessary rights and franchises to use and occupy said roads and will subsequently apply to this Commission for the right and authority to exercise the same.

Public hearings were held on this application at San Francisco, California, on June 13, 20, and 21, 1929.

Evidence presented indicates that Pacific Gas & Electric Company is now and has been serving manufactured gas of 550 B.T.U. heat content to its consumers in the cities and suburbs of Oakdale, Stockton, Lodi, Sacramento, Roseville, Woodland, Davis, Richmond, Vallejo, Napa, Santa Rosa, San Rafael, Sausalito, and others, for domestic, commercial, and some industrial purposes; further, that it has been in the business of serving such gas for the past twenty-four years in this state, and that during the year 1928, it served 97 per cent of all the gas sold and 98 per cent of all of the gas consumers from and including the city of Fresno, north; further, that during the year 1928 its total gas sales amounted to 21,068,000,000 cubic feet of 550 B.T.U. manufactured gas, and that on December 31, 1928, the total number of gas consumers being so served by ap-

plicant was 467,093, or approximately 45,000 cubic feet per consumer per year; and further, that the average daily send-out was approximately 70 per cent of the maximum daily send-out.

Further evidence presented indicates that applicant has entered into contracts for the purpose of securing a supply of natural gas from producers in the Kettleman Hills and Buttonwillow fields, namely, Milham Exploration Company, Texas Oil Company, and Standard Oil Company of California, adequate in quantity to meet its needs for some years to come.

Applicant's witnesses testified that public convenience and necessity require and will require the building of this line by applicant, in order that applicant may bring natural gas to the territory traversed by same, build up an industrial load therein, augment the supply of natural gas to its San Francisco and east bay divisions, and hasten the time of serving straight natural gas to all consumers in that territory and in the territory reached by the installation of its Buttonwillow-Milpitas line and of this second line from the source of supply.

Evidence presented by witnesses for Coast Counties Gas & Electric Company, protestant, indicates that Coast Counties Gas & Electric Company is now and has been serving manufactured gas of 550 B.T.U. heat content to its consumers in its so-called "Northern Division," the service area of which it designates as follows:

All of that territory which is bounded on the north by those bodies of water known as San Pablo bay, Carquinez straits, Suisun bay, and the

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San Joaquin river; and on the west, south, and east by a line drawn at and from a point known as Point Pinole, running southeasterly to Walnut creek; thence northwesterly to Antioch;

that the manufactured gas thus served is now being and has been purchased at wholesale by Coast Counties Gas & Electric Company, from Pacific Gas & Electric Company at a point near the junction of the Richmond-Martinez highway and the Giant Road in the vicinity of the Sebrante Grant Line in Contra Costa county, under contract between the two above-mentioned utilities dated July 29, 1926, and which expires on November 24, 1931. This contract covers the purchase and sale of "all of the gas which shall be required for sale by the consumer (Coast Counties Gas & Electric Company) to its own consumers of gas, except such gas as shall from time to time be generated by consumer's own gas plant during the term, at the prices and upon the terms and conditions specified." Applicant (seller) takes the position that this contract is binding for the service of

wholesale natural gas, while Coast Counties Gas & Electric Company, purchaser, takes the position that this contract covers only wholesale manufactured gas and not natural gas and asks the Commission to interpret such contract. We feel that it is not incumbent upon the Commission to interpret this contract.

At the hearing, Coast Counties Gas & Electric Company protested the granting of this application, unless, in the certificate, applicant be restricted to wholesale gas service to Coast Counties Gas & Electric Company, as respects the service area of the northern division of the latter, and that applicant be not permitted to serve gas directly to any class of consumers in such area. In this connection, it seems fair that Coast Counties Gas & Electric Company should have the first opportunity to serve the consumers in its own service area. However, such consumers are entitled to receive the best possible service at the lowest possible rate.

The application will be granted subject to such limitations as seem warranted.

DISTRICT OF COLUMBIA PUBLIC UTILITIES COMMISSION

Re Capital Traction Company

[Order No. 807, Formal Case No. 205.]

Valuation — Past valuation plus additions and betterments.

1. Value determined at some time in the past, with the net cost of additions and betterments to date, cannot be used to determine the rate base, in view of the inability of the Commission to have before it those elements of value which must be taken into consideration, p. 28.

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Return — Operating expenses — Company seeking increase — Economies.

2. Utilities requesting increased fares should do everything reasonably possible to effect economies and to increase their revenues by reduction of operating expenses before seeking to increase them by forcing the rate-payers to pay more money for the service rendered, p. 29.

Intercompany relations — Joint use of facilities — Street railways — Economies.

3. Notwithstanding substantial economies that would accrue to both street railway companies serving the same metropolitan area from the joint use of track and other facilities, the Commission refused to compel such measures in view of the doubtful realization of such economies without the wholehearted co-operation of both companies, p. 29.

Rates — Reasonableness — Point of diminishing return — Street railways.

4. Estimates of probable revenue of street railway companies asking for increased rates, based on the assumption that no diminution of riders would result from such increased fare, were held to be highly conjectural, p. 30.

Rates — Burden of proof — Competing street railways.

5. Two competing street railway companies, both seeking rate increases, were held not to have sustained the burden of proof warranting such relief where there was no competent evidence adduced showing the present value of the properties involved and where other evidence of the return and operating cost was confused and conjectural and where it appeared that a merger of the two companies, already authorized by law, would result in greater economies amounting to more than the additional estimated revenue from the proposed increase, p. 30.

Merger — Desirability — Competing street railways.

Discussion of the economies in operating costs likely to accrue from the merger of two competing street railway companies serving the same metropolitan area, through the joint use of facilities and other advantages, p. 30.

[November 13, 1929.]

APPPLICATION of two street railway companies for increased rates; denied pending the submission of further evidence as to the value of the properties involved and other matters.

By the COMMISSION: The Capital Traction Company, hereinafter termed the capital company, on June 13, 1929, petitioned for authority to increase fares upon its street railway lines from 8 cents cash or six tokens for 40 cents to 10 cents cash or four tokens for 30 cents. It alleged that existing fares were confiscatory and incapable of producing a reasonable

return upon the fair value of its properties devoted to the public service; and asked that the Washington Railway & Electric Company, hereinafter called the Washington Company, be made a party to the proceeding. That company was made a party as were other street railway and bus companies operating in intradistrict service. The Washington Company

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in its answer requested a similar increase in fares on its line arguing the same reasons as had been advanced by the Capital Company.

The case was set for hearing before the Commission on July 29, 1929, and hearing continued, with few interruptions, until October 7, 1929. Two thousand, three hundred and eighty-two pages of evidence and one hundred and forty exhibits have been received.

The Capital Company claimed that the fair value of its properties used and useful in the public service was not less than \$26,080,144.72. It arrived at this amount by adding to the value fixed by the court of appeals of the District of Columbia as of January 1, 1925, claimed net costs of additions and betterments from that date to January 1, 1929. It offered certain cost indices published by the National Electric Railway Association purporting to show unit price trends over a period of years. It produced no inventory as of 1929; made no detailed showing as to the physical condition of its properties; and submitted no other evidence as to the reproduction cost new or less depreciation, the recorded money outlay, or the original cost to date, as of 1929.

The Washington Company claimed a minimum value for rate-making purposes of \$19,210,899.39 determined by adding to the fair value found by the Commission as of June 30, 1919, the claimed net cost of additions and betterments from that date to April 30, 1929. It produced no inventory as of 1929; made no detailed showing as to the physical condition of its properties; and submitted no other evidence as to the reproduction cost

new or less depreciation, the recorded money outlay, or the original cost to date, as of 1929.

Both companies claimed that they were operating as efficiently as possible under existing conditions and that their operating expenses could not be further reduced without impairing the quality and/or quantity of the service rendered.

The Capital Company introduced evidence intended to show that the rate of return upon its claimed fair value had been as follows: 1926, 4.30%; 1927, 3.92%; 1928, 3.64%.

The Washington Company's evidence was intended to show that its rate of return upon its claimed value had been as follows: 1926, 3.99%; 1927, 4.13%; 1928, 4.32%.

The Capital Company, on the basis of an assumed new ratio of token to cash fares, estimated that the increased fare would have the effect of increasing the rate of return upon its claimed fair value to 4.88 per cent. The Washington Company similarly estimated that its rate of return would be increased to 6.25 per cent. Both companies contended that their rate of return so estimated was less than the reasonable rate to which they are entitled under the law. The Capital Company stated that it had decided, for reasons which it deemed controlling, to ask, at this time, for only the increased fare for which it prayed, even though fully aware that such fares would not produce the rate of return to which it believes itself entitled. The Washington Company asked for the same increased fares as were sought by the Capital Company. This was said to be based upon prior decisions of the Commission

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that there should be the same level of street car fares for all street car companies; and both companies very strongly upheld this policy of the Commission.

Much evidence was introduced to show prevailing fares in other large cities, and the operating ratios of the agencies furnishing street railway service in such cities. This was with two objects in view, to show that the increased fare asked in Washington was not out of line with fares paid by street car riders elsewhere, and that the operating efficiency of the Washington street car lines compared favorably with that of lines in other jurisdictions. Little detail as to the physical properties or operating conditions in other cities was submitted.

The Commission holding that question of operating costs must be considered in the determination of the issues presented by the companies' pleading sought to determine what, if any, operating economies would result from unified operation of these two street railway companies, or from the joint use of each other's facilities without a corporate merger. It also attempted to develop the saving in operating expenses which might be expected in the event that such corporate merger, as now authorized by law, became a fact.

[1] A public utility is entitled to a reasonable return upon the fair value of its property used and useful in the public service. However, the determination of whether or not specific fares are confiscatory must be made upon the basis of the fair value of the properties *at the time* of the inquiry. (*McCardle v. Indianapolis Water Co.* (1926) 272 U. S. 400,

408, 71 L. ed. 154, P.U.R.1927A, 15, 47 Sup. Ct. Rep. 144; *Standard Oil Co. v. Southern P. Co.* (1925) 268 U. S. 146, 157, 69 L. ed. 890, 45 Sup. Ct. Rep. 465; *Brooks-Scanlon Corp. v. United States* (1924) 265 U. S. 106, 125, 68 L. ed. 934, 44 Sup. Ct. Rep. 471; *Bluefield Water Works & Improv. Co. v. West Virginia Pub. Service Commission* (1923) 262 U. S. 679, 67 L. ed. 1176, P.U.R.1923D, 11, 43 Sup. Ct. Rep. 675; *Georgia R. & Power Co. v. Railroad Commission* (1923) 262 U. S. 625, 630, 67 L. ed. 1144, P.U.R.1923D, 1, 43 Sup. Ct. Rep. 680; *Missouri ex rel. South-Western Bell Teleph. Co. v. Public Service Commission* (1923) 262 U. S. 276, 278, 67 L. ed. 981, P.U.R.1923C, 193, 43 Sup. Ct. Rep. 544, 31 A.L.R. 807). It is not sufficient for those purposes to set up a fair value determined at some time in the past and add to it the net cost of additions and betterments to date. (*St. Louis & O'Fallon R. Co. v. United States* (1929) 279 U. S. 461, 73 L. ed. —, P.U.R.1929C, 161, 49 Sup. Ct. Rep. 384). The figure thus determined may be either too high or too low and does not afford a proper basis for rate-making, nor enable the Commission to have before it those elements of value which the courts have repeatedly held must be taken into consideration.

As hereinbefore set forth, the fair value claimed by each street railway company was determined in just this manner, without current inventory or showing of the physical condition of the properties, by adding the net cost of additions and betterments to a fair value, in one case nearly four years, in the other ten years old.

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The evidence plainly disclosed errors in accounting which rendered inexact the values claimed by both companies, and more important still uncontradicted evidence showed that the accounting methods of the two companies differed markedly in their treatment of charges to capital account, so that the fair value claimed by one or the other of the two must necessarily be incorrect.

No revamping of the accounts of the companies would make possible the ascertainment of their true fair value as of today, and there are not sufficient facts in the record to make possible such a restatement of investment. The fair present value of the properties can be determined in no other way except by a new valuation which would take into consideration all of the elements of value in accordance with the decisions of the courts.

[2] The Commission believes thoroughly that the utilities requesting increased fares should do everything reasonably possible to effect economies, to increase their net revenues by reducing their operating expenses before seeking to swell these revenues by forcing the street car riders to pay more money for the service rendered by the railway companies.

The Commission has devoted much time and thought to the ways indicated in the record in which possible operating economies might be effected. It accepts the contention of the companies that, as now constituted, they are efficiently managed and operated. So long as conditions remain as they are, two entirely separate competing systems endeavoring to serve the city over routes which in some

cases are not well adapted to the city's needs, in other cases might be advantageously combined or abandoned, the aggregate cost of maintaining the service as at present cannot be materially reduced.

The street railway service rendered in Washington compares favorably with that rendered by like agencies in other cities. There is only one other city in the country, New York, where there is the underground street car trolley construction of which there are 111.431 miles in the District of Columbia. The operation and maintenance of this system is much more costly than that of the usual overhead construction. That the operating ratios of the two companies here are kept at the prevailing low rates speaks well for the management.

[3] During the progress of the hearing an effort was made to develop the economies which would result from the joint use of tracks and other facilities without a corporate merger, this either voluntarily on the part of the two companies, or by orders of the Commission. While the record indicates that economies might be effected, and the service even improved in this way, there is no way of gauging with accuracy the amount by which the cost of operating the lines could be thus reduced. Furthermore, the study which the Commission has made suggests that without the hearty co-operation of the still competing companies, and without an agreement on their part to inaugurate unified operating control, a difficult matter while they are separate entities, the probability of substantial savings in the operating departments is quite remote.

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On the other hand, the record does show that if a corporate merger is effected, there will quite certainly be a very considerably less amount needed to operate the resulting single street railway system thus brought into being, while at the same time there will be no lessening, but probably an improvement in both the quantity and quality of the service rendered. For example, the overhead expenses for a single company will be manifestly less than the aggregate of the cost of this same item for two separate companies. There will be but one set of books to keep, but one series of reports to render, instead of two as at present. A single management can bring about reforms in the routeing of cars, the probable abandonment of certain trackage, the elimination of the duplication of certain facilities and in those and other ways indicated in the record can materially increase the rate of return upon the fair value of the property of the single company used and useful in the service, over and above the rates of return now prevailing for the two separate companies.

The record contains evidence of estimates that the economies resulting from a corporate merger of the two companies would total as much as one million dollars per year. While it is true that these are estimates only, and the savings resulting from a merger cannot be known with accuracy in advance of its conclusion, the character of the evidence leads the Commission to believe that it is worthy of credence, and that the possible economies are under, rather than over, stated.

Granting the correctness of this last

statement, it is at once apparent that the two companies have in their own hands the remedy for the conditions of which they complain, without further taxing, for their benefit, those whom they serve. The combined increase in net revenues which the two companies estimate (and again but an estimate) which would follow the increased fare sought, is about \$900,000; the estimated savings due to unification, if as estimated, about \$1,000,000 if realized, would, therefore, produce a larger net return than the higher fares.

[4] Again, the companies' estimate of the net results of the increased charge upon the street car riders is based upon the assumption that this higher fare would result in no diminution in the number of riders, or at least if such a decrease in patronage does show itself, that it will be temporary and not permanent. It is not to be denied, however, that increased charges for service are not always followed by increases in revenue. The companies may well be mistaken in their prognostications. As the record is studied it becomes more and more apparent that much of the evidence deals with conjectures, estimates, predictions as to what will happen in the future if certain things are done.

[5] These then are the facts which confront the Commission in an attempt to reach a decision.

First—There is no valuation, as of today, of the properties of the two street railway companies and, therefore, no rate bases upon which to determine either the return now earned nor that which would be earned if the increased fare is granted.

Second—Wide differences in ac-

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counting methods used by the two companies and certain errors in the accounting records disclosed by the evidence render it impossible to ascertain with the necessary degree of certainty the actual operating expenses or the net railway operating income of the companies.

Third—The evidence as to the rate of return which would be produced by the proposed increased fares is conjectural.

Fourth—The Commission has the right, and it is its duty, to insist that the companies effect all reasonably possible operating economies before authorizing them to swell their gross revenues by exacting higher fares from the street car riders.

Fifth—The Commission has the power to compel the companies to make joint use of each other's tracks and facilities. This might result in lesser cost of operation, and in a measure bring about the relief sought by means of higher fares. Without the whole hearted co-operation of the companies the full possibilities of such a forced unification of operations could not be realized and, therefore, this procedure might result in little or even no improvement in existing conditions.

Sixth—A corporate merger, now authorized by law, would substitute unified for dual control of street railway operations in this city, would better the street car service, and would undoubtedly bring about economies, which with the present rate of fare, would probably put the new merged company in a better condition financially than that of the two separate

companies if they are granted the increased fare and if their expectations of its monetary results are fully realized.

Seventh—Under such circumstances this Commission is not justified in compelling the street car riders of this city to pay nearly a million dollars more per year for the benefit of the two competing street railway companies.

The companies requesting the increase in fares were faced with the burden of proof. The Commission, after carefully reviewing all of the evidence presented, finds that the companies have not met this burden. The evidence presented does not afford a basis for final determination of all of the issues involved. The proceeding has been left open for the taking of further testimony with respect to certain features of the case. It, therefore, is unnecessary at this time to rule upon the several motions made at the hearing.

It is, therefore,

Ordered:

That upon the showing made in the record, the requests of the Capital Traction Company and the Washington Railway & Electric Company to be allowed to charge street car riders 10 cents cash, or four tokens for 30 cents are denied. The case is, however, held open, and the parties thereto are hereby authorized and permitted to submit further evidence as to the present value of their properties, or to suggest, for the action of the Commission, other ways in which the relief sought may be obtained.

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Re Central Public Service Corporation

[Case No. 2996, Order No. 15073.]

Public utilities — Commission jurisdiction — Corporate control — Holding company.

1. A local holding corporation owning the controlling stock of a foreign holding corporation which in turn owned the controlling stock of a local operating gas utility was held to be a public utility subject to the jurisdiction of the Commission by virtue of a law extending such jurisdiction to any corporation "controlling" properties devoted to the manufacture, sale, or distribution of gas within the state, p. 34.

Public utilities — Charter powers — Commission jurisdiction.

2. A gas corporation incorporated under the laws of the state does not become subject to the jurisdiction of the Commission, no matter how broad its charter powers as a gas corporation may be, until it actually owns or operates, manages or controls, a gas plant within the state, p. 35.

Security issues — Commission jurisdiction — Holding company — Local subsidiary.

3. The Commission, in exercising its jurisdiction over the security issues of a holding corporation controlling a local operating utility, need concern itself only with safeguarding the welfare of the local utility to the extent that its safety and adequacy of service, rates, administration, and the like might be affected by the proposed security issues of its parent, p. 35.

Commissions — Jurisdiction — Holding company.

4. The Commission has no jurisdiction over mere holding companies except where their holdings carry with them the control of some public utility within the state over which the Commission has jurisdiction, and even then, only to the extent that its activities might affect the welfare of the local operating subsidiary, p. 35.

Security issues — Holding company controlling local utility — Sufficiency of application.

5. The application of a holding corporation controlling a local operating subsidiary for Commission authority to issue securities should at least state with reasonable fullness such facts as may be required to enable the Commission, and those legitimately interested therein, to ascertain whether its proposed stock issues are in fact, as to all its public utility and other properties outside of the state, bona fide, and for value, p. 35.

Security issues — Commission powers — Holding company.

6. The Commission, in passing on a proposed security issue of a holding company which controls a local operating utility, is entitled to know what part of the money to be raised is to be applied to the pecuniary benefit of nonutility properties or utility properties outside of the state and what part, if any, is to be applied to the pecuniary benefit of a utility subsidiary within the state, p. 37.

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Security issues — Commission jurisdiction over proceeds — Holding corporation.

7. As to that portion of the money raised by the security issues of a holding corporation owning the controlling interest of a local operating utility which is to be used for the pecuniary benefit of such operating subsidiary, the Commission has as full supervisory control as if the holding corporation did not control other properties outside of the state, p. 37.

Security issues — Commission jurisdiction — Holding corporation.

8. The Commission, in the opinion of its general counsel, should, before granting permission to a holding company controlling a local utility to sell securities to a foreign corporation, require the vendee company to make a formal application for leave to buy the stock or else require the vendor corporation to lay before it some authentic evidence, such as a contract, of the proposed vendee's actual agreement to buy the stock, p. 37.

Sale — Commission powers over purchaser — Holding corporation.

9. In dealing with the right of one gas corporation to purchase the stock of another gas corporation which controls a gas plant within the state, besides controlling other properties outside of its limits, the powers of the Commission are much broader than when dealing with the seller of the stock, and the Commission is not bound to sanction the transaction at all unless it thinks the purchase calls for its approval, p. 37.

[October 30, 1929; November 15, 1929.]

APPPLICATION of a Maryland holding company controlling a Maryland operating utility to sell securities to a Delaware holding corporation; application approved in accordance with the opinion of the General Counsel for the Commission, with modifications suggested by him.

Opinion of General Counsel

Frank Harper, Esq., Executive Secretary, Public Service Commission of Maryland, Munsey Building, Baltimore, Md.

Dear Sir:

At the request of the Commission, I have carefully considered the application of the Central Public Service Corporation in the above entitled case. It asks the Commission for leave to sell and issue to the Central Public Service Company, a foreign corporation, and the present owner of all the outstanding common stock of the applicant, 800,000 shares, without par value, of the common stock of the ap-

plicant, for the total sum of \$1,900,076.73, and, under the direction of the Central Public Service Company, to allocate the total amount of that sum, in the proportion of \$924,948.36, to the capital account of the applicant, and, in the proportion of \$975,128.37, to the surplus account of the applicant.

The applicant also asks the Commission for leave to sell an issue of 252,855 shares, without par value, of the authorized, but unissued, Class A stock, of the applicant, in two blocks of 52,855 and 200,000 shares, respectively, as follows: The block of 52,855 shares is proposed to be issued and sold, as full paid, nonassessable stock, to the common stock-

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holders of the applicant, of record, at the close of business, on September 20, 1929, in full payment, ratably, at the price of \$17.50 per share, of the total price of \$924,962.50, of a dividend, declared by the applicant out of a fund, accumulated by the applicant, which became payable to those stockholders on September 30, 1929; the payment to be evidenced by the transfer, upon the books of account of the applicant, of the amount of the accumulated fund, just mentioned, from surplus to capital account.

The block of 200,000 shares of Class A stock of the applicant is proposed to be sold and issued on the open market, or to bankers, or to subscribers, under the customer-ownership sales plan of the applicant.

The applicant is a Maryland corporation, and, in addition to its character as a holding corporation, and otherwise, is expressly authorized by its charter to perform the corporate functions of a gas corporation; and owns all, or the majority, of the common stock of the Central Gas & Electric Company, a foreign corporation, which, in turn, owns all, or the majority, of the common stock of the Hagerstown Light & Heat Company of Washington county, a Maryland corporation which operates a gas plant in Washington county, in the state of Maryland.

[1] Under these circumstances, the applicant, in my opinion, is a "gas corporation," and, as such, subject to the jurisdiction of the Public Service Commission of Maryland, because, by § 346, of Art. 23, of the Annotated Code of Maryland, the term "gas corporation" is made to include not only any corporation owning, operating, or

managing, but also any corporation "controlling" any plant, or property, for manufacturing, distributing, and selling for distribution, and selling or distributing illuminating gas (natural or artificial or manufactured, and wheresoever and howsoever derived or obtained) for light, heat, fuel, or power, or for any public use whatsoever; and because, by § 350, of the same Article, it is provided that the jurisdiction, supervision, powers, and duties of the Public Service Commission shall extend to the manufacture, sale, or distribution of gas, natural and artificial, within the state of Maryland, and to the persons, or corporation, owning, leasing, operating, or "controlling" the same, and to gas plants, and to persons or corporations owning, operating, leasing, or "controlling" the same.

In my judgment, a gas corporation which owns all, or the majority, of the capital stock of another gas corporation, which owns a gas plant, "controls" the plant, in the sense of §§ 346 and 350 of Art. 23 of the Annotated Code of Maryland. It is true that the Central Public Service Corporation does not control the plant of the Hagerstown Light & Heat Company immediately, but only mediately, through its ownership of all, or the majority, of the common stock of the Central Gas & Electric Company, but this, in my judgment, also constitutes "control," within the intent of §§ 346 and 350 of Art. 23, of the Annotated Code of Maryland. The ownership by corporation A of all, or the majority, of the capital stock of corporation B, and the ownership by corporation B of all, or the majority, of the capital stock of corporation C, a gas corpora-

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tion, which owns a plant in the state of Maryland, gives, as I see it, to both corporation A and corporation B, a share in the control of the plant of corporation C, that brings each of them under the jurisdiction of the Commission. They are links in chain of common control; though only corporation C actually operates the plant; otherwise, corporation A, by merely interposing an intermediate corporation between itself and corporation C, could wholly escape the authority of the Commission, no matter to what extent it might be the real moving impulse back of the plant of corporation C, and no matter to what degree its corporate acts might tend to inflate the rates, or impair, the service, charged, or rendered, to the general public, by corporation C.

[2, 3] I quite agree with the attorney general of Maryland in believing that a gas corporation, incorporated under the laws of the state of Maryland, does not become subject to the jurisdiction of the Commission, no matter how broad its charter powers, as a gas corporation, may be, until it actually owns, or operates, manages, or controls a gas plant within the state of Maryland; XV Ann. Rep. Md. P. S. C. 281; but I go further than the case before him called for, and express the opinion that control can also be predicated of any Maryland gas corporation, in an interconnected series of gas corporations, that, by reason of interlocking stock ownerships, is capable of either originating or passing on a corporate movement which eventually asserts a directing influence over the workings of a gas plant, within the state of Maryland. The Hagerstown Light & Heat Com-

pany of Washington county is subject to the jurisdiction of the Commission because it operates a gas plant within the state of Maryland, and it is only in relation to it, of course, that the Commission need ordinarily concern itself, as respects safety and adequacy of service, rates, administrative practices, and the like, but, in my view, the Central Public Service Company, the Central Public Service Corporation, and the Central Gas & Electric Company, are all joint participants in the control of the gas plant of the Hagerstown Light & Heat Company of Washington county, and, to the extent that this control may be asserted by any one, or more, of them, alike subject to the jurisdiction of the Commission. Indeed, for the purposes of that jurisdiction, they constitute a unit.

[4, 5] The application in this case is open, therefore, I think, to criticism, in more than one particular. It states in general terms only that the applicant proposes to use the large sums that it desires to raise, in the manner hereinbefore mentioned, for the acquisition of property (i. e., bonds, stocks, and other securities), the discharge or lawful refunding of its obligations, and the reimbursement of moneys actually expended for the acquisition of property (i. e., bonds, stocks, and other securities), as authorized by the Public Service Commission Law. Manifestly, the applicant should be more specific; if it is possible for it to be so at the present time. As I am informed, it owns, operates, manages, or controls other gas plants, and other public utilities besides gas plants, outside of the state of Maryland. These utilities, of

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course, are wholly beyond the reach of the jurisdiction and authority of the Commission, so far as the assertion of any direct control by it, over them, is concerned. Only to the extent that the application of the amounts, proposed to be raised by the Central Public Service Corporation, will, or may, affect the Hagerstown Light & Heat Company of Washington county, in the performance of its corporate functions, as a gas corporation, has the Commission any interest in them, such as to justify an inquiry by it into the manner in which they are to be expended. Obviously, the Commission has no jurisdiction over mere holding companies, except where their holdings carry with them the control of some public utility within the state of Maryland, over which the Commission has jurisdiction, and even then, when the corporation controlling such public utility, owns, operates, manages, or controls other public utilities, in other states, and wishes to raise money for the benefit of its public utilities, both in and outside of the state of Maryland, the Commission is not invested with any supervisory powers over the expenditure of any part of the money in such other states, or the apportionment of the entire expenditure, as between the different states involved; nor, under those circumstances, has it the power to approve the wisdom or condemn the unwisdom of applications of portions of the whole amount, so expended, to the corporate requirements of such of the public utilities as exist in other states than Maryland. The final decision, in matters of this nature, must rest with the officers and directors of the corporation. *Laird v.*

Baltimore & O. R. Co. (1913) 121 Md. 179, 190, 88 Atl. 347. *A fortiori* is all this true when the applicant, as in the present case, not only owns, operates, manages, or controls public utilities, both in and outside of the state of Maryland, but nonpublic utility properties outside of the state of Maryland besides; and also wishes to raise money by a stock issue for the benefit of these last-mentioned properties, too. But, nevertheless, under even conditions of this nature, the application to the Commission of such a corporation as the Central Public Service Corporation, or its reports rendered, pursuant to a preliminary order of the Commission passed upon such an application, should, at least, state, with reasonable fullness, such facts as may be required to enable the Commission, and those legitimately interested therein, to ascertain whether its proposed stock issues are, in fact, as respects all its public utility and other properties outside of the state of Maryland, bona fide, and for value.

"What the law-making power may do, the extent of what it can do," said the court in the *Laird Case*, *supra*, at p. 191, "is to say that the Public Service Commission shall have presented to it the price at which bonds about to be issued have been agreed to be disposed of, or have been disposed of, so that the investing public may know the value that has gone into the company for the furtherance of its operations, and that the bonds which they are being asked to purchase represent a bona fide, honest transaction in which the company has received value, instead of a doubtful, diluted issue not created and put forth in good faith."

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[6, 7] In the present case, therefore, the Commission is entitled to know from the application of the applicant, or from reports rendered by it, pursuant to a preliminary order of the Commission passed upon such application, what part of the whole amount of money, proposed to be raised by the Central Public Service Corporation, is to be applied to the pecuniary requirements of the public utility plants, or nonpublic utility properties owned, operated, managed, or controlled by the Central Public Service Corporation, outside of the state of Maryland, or is to be used in other ways, that will, or may, affect the welfare of the corporation owning, operating, managing, or controlling such plants or properties; or their ability to discharge their corporate duties, as public service corporations; and also, to what specific purposes, and in what specific amounts, the sum that is to be so employed, is to be so applied or used. And the Commission is even more assuredly entitled to know from the application of the applicant, or from reports rendered by it pursuant to a preliminary order of the Commission, passed on such application, what part of the whole amount, proposed to be raised by the Central Public Service Corporation, is to be applied to the pecuniary requirements of the gas plant of the Hagerstown Light & Heat Company of Washington county, or is to be used, in other ways, that will, or may affect the welfare of that company, or its ability to discharge its corporate duties, as a public service corporation; and also to what specific purposes and, in what specific amounts, the sum, that is to be so employed, is to be so applied or

used; and, as to that sum, the Commission has as full supervisory control as if the Central Public Service Corporation did not own, operate, manage, or control any public utility plant or nonpublic utility property outside of the state of Maryland.

[8, 9] The application of the applicant is also defective in form in that it does not include, and is not accompanied, in any way, by a petition by the Central Public Service Company that it be authorized, by the Commission, to acquire that part of the capital stock of the applicant which the latter proposes to sell and issue to it, either for a pecuniary consideration, in the ordinary way, or in return for a release of the dividends payable to it by the applicant; and it is not even accompanied by a copy of any written contract, showing that the Central Public Service Company has actually agreed to buy any stock from the applicant. It is important to bear in mind that, in the present case, one gas corporation is seeking leave from the Commission to sell and issue most of the stock, proposed to be issued by it, to another gas corporation, for as I am informed, the Central Public Service Company is authorized by its charter to exercise all the powers of a gas corporation, and to acquire and hold the stock of any private corporation; and does own, operate, manage, or control gas plants and other properties, outside of the state of Maryland, as well as control the gas plant of the Hagerstown Light & Heat Company of Washington county in Washington county, Maryland. This being so, now that the Central Public Service Company proposes to purchase, in the two ways just mentioned, a

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large block of the capital stock of the applicant, in this case, it plainly falls within the provisions of § 394, of Art. 23, of the Annotated Code of Maryland, which declare that no gas corporation shall, directly, or indirectly, acquire the stock or bonds of any other corporation, incorporated for, or engaged in, the same or similar business, unless authorized to do so by the Commission. In dealing, therefore, with the right of one gas corporation to purchase the stock of another gas corporation, which controls a gas plant in the state of Maryland, and owns, operates, manages, or controls gas plants and other properties outside of its limits, besides, the powers of the Commission are clearly much broader than when dealing with the seller of the stock. It is not bound to authorize the acquisition of the stock by the vendee corporation at all, unless it thinks that the purchase is one that calls for its approval. Before then, the Commission gives its sanction in any form, or to any extent, to the proposed sale of the stock, in this case, to the Central Public Service Company, it would be well for it, as a matter of proper procedure, to require that company to make a formal application to it for leave to buy the stock, and its application should comply with all the provisions of Rule XI, of the Commission, relating to applications for authority to acquire shares of stock, which are germane to the circumstances, surrounding the application of the applicant in this case. Or, if the Commission does not do this, it should, at least, require the applicant, in this case, to lay some authentic evidence, in the form of a written contract, or otherwise, before

it, showing that the Central Public Service Company has actually agreed to buy the stock. Authority from the Commission to the Central Public Service Corporation to sell the stock to the Central Public Service Company necessarily involves authority from the Commission to the Central Public Service Company to buy the stock from the Central Public Service Corporation. XIII Ann. Rep. Md. P. S. C. 287; but, as, unlike in the case just cited, no order has yet been passed by the Commission in this case, there is no reason why the agreement of the Central Public Service Company to buy the stock in question should not, as a matter of regular procedure, be evidenced by its own application as well as that of the Central Public Service Corporation, or in some other adequately authentic form as by the production of a copy of the written contract of sale and purchase relating to the stock, or otherwise.

Truly yours,

WM. CABELL BRUCE.

By the COMMISSION: *Whereas*, the Central Public Service Corporation, a corporation, duly incorporated under the laws of the state of Maryland, has applied to the Commission for leave to sell and issue to the Central Public Service Company, a corporation, duly incorporated under the laws of the state of Delaware, and the present owner of all the outstanding common stock of the Central Public Service Corporation, 800,000 shares, without par value, of the common stock of the Central Public Service Corporation for the total sum of \$1,900,076.73, and, under the direction of the Central Public Service Company, to allo-

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cate said total sum, in the proportion of \$924,948.36, to the capital account of the Central Public Service Corporation, and, in the proportion of \$975,128.37, to the surplus account of the Central Public Service Corporation, and,

Whereas, by said application the Central Public Service Corporation has also applied to the Commission for leave to sell and issue 252,855 shares, without par value, of the authorized, but unissued, class A stock of the Central Public Service Corporation, in blocks of 52,855 and 200,000 shares, respectively, as follows:

Said block of 52,855 shares to be issued and sold, as full paid, nonassessable stock, to the common stockholders of the Central Public Service Corporation, of record, at the close of business on September 20, 1929, to wit: the Central Public Service Company, its only common stockholder, at the price of approximately \$17.50 per share, or the total price of \$924,948.36, being an amount equal to a dividend upon the common stock of the Central Public Service Corporation, declared by that Corporation, which became payable to those stockholders, to wit: the Central Public Service Company, its only common stockholder, on September 30, 1929; the payment to be evidenced by the transfer upon the books of account of the Central Public Service Corporation of the amount of such dividend from surplus to capital account; and said block of 200,000 shares of said Class A stock of the Central Public Service Corporation to be sold and issued on the open market, or to bankers, or to subscribers, under the customer-ownership sales plan of the

Central Public Service Corporation, and,

Whereas, the Central Public Service Corporation is a Maryland corporation, as hereinbefore recited, and, in addition to its character as a holding corporation, and otherwise, is expressly authorized by its charter to perform the corporate functions of a gas corporation, and owns all, or the majority of the common stock of the Central Gas & Electric Company, a foreign corporation, which, in turn, owns all, or the majority of the common stock of the Hagerstown Light & Heat Company of Washington county, a corporation duly incorporated under the laws of the state of Maryland, which operates a gas plant in Washington county, in the state of Maryland, and,

Whereas, the Central Public Service Company is authorized, by its charter, to exercise all the powers of a gas corporation, and owns all the common stock of the Central Public Service Corporation, as hereinbefore recited, and is, with it, and the said Central Gas & Electric Company, a link in a chain of common control over the Hagerstown Light & Heat Company of Washington county, and its gas plant, and,

Whereas, therefore, the Central Public Service Corporation, and the Central Public Service Company, are incorporated for, and engaged in, the same or a similar business, and,

Whereas, the Central Public Service Company has filed a petition with the Commission, in this case, asking the Commission to authorize it to acquire said 800,000 shares of the common stock of the Central Public Service Corporation, and said 52,855

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shares of said Class A stock of the Central Public Service Corporation, and

Whereas, it is stated in the petition of the Central Public Service Corporation, in this case, that it proposes to use all the proceeds of sale from said 800,000 shares of common stock, and said 52,855 shares of Class A stock, for the acquisition of bonds, stocks, and other securities, the discharge or lawful refunding of its obligations, or the reimbursement of moneys actually expended for the acquisition of bonds, stocks, and other securities; and,

Whereas, the Commission is advised by its general counsel that, in his opinion, its jurisdiction over such issues of stock as those now proposed to be issued by the Central Public Service Corporation, and the allocation, or other disposition, of the proceeds of sale thereof, is (except so far as the issuance of such stock or the allocation, or other disposition, of the proceeds of sale thereof, may involve the assertion, in some form or other, of the control that the said Central Public Service Corporation is in a position to assert over the operations of the Hagerstown Light & Heat Company of Washington County) limited to the reports hereinafter required of the Central Public Service Corporation; and,

Whereas, it appears from the supplemental petition of the Central Public Service Corporation, in the above entitled case, that no part of said proceeds of sale will be applied to the pecuniary requirements of the gas plant of the Hagerstown Light & Heat Company of Washington County, or to the acquisition of any of its stock,

bonds, or other securities, or will be used in any other way that would, or might, directly affect the welfare of that company, or its ability to discharge its corporate duties; and,

Whereas, it is believed by the Commission that the acquisition of said 800,000 shares of the common stock, and of said 52,855 shares of Class A stock of the Central Public Service Corporation, by the Central Public Service Company would not involve the exercise, in any form, by the latter Company of its control over the operations of the Hagerstown Light & Heat Company of Washington County, or prejudice its welfare in any manner.

Now, therefore, the said application of the Central Public Service Corporation having come on for hearing, after due notice given, pursuant to Order No. 14960 of the Commission, and the said petition of the Central Public Service Company having been received and considered, as a part of said application, it is, this 15th day of November, in the year 1929, by the Public Service Commission of Maryland.

Ordered: (1) That the Central Public Service Company be, and it is hereby authorized, to acquire, by purchase, at the prices, and in the manner, hereinbefore recited, all of said 800,000 shares, of the common stock of the Central Public Service Corporation, and all of said 52,855 shares, of Class A stock of the Central Public Service Corporation.

(2) That, as soon as the sales of said 800,000 shares of the common stock of the Central Public Service Corporation, and of said 52,855 shares of Class A stock of the Central

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Public Service Corporation, shall have been consummated, the same shall be duly reported by the Central Public Service Corporation to the Commission, so as to become a part of its permanent records.

(3) That, on January 1, 1930, and, at intervals of each six months thereafter, the Central Public Service Corporation shall report with reasonable fullness to the Commission the price, or prices, at which all, or any part, or parts, of said 200,000 shares of Class A stock shall have been agreed to be sold, or shall have been sold, and the specific purpose, or purposes, to which the proceeds of sale, in each instance, are proposed to be applied, or shall have been applied, and all other such facts as may be required to enable the Commission and those legitimately interested therein to ascertain whether

any issue, or issues, of said stock is, or are, in fact bona fide and for value.

(4) That, without the approval of the Commission given and pursued as prescribed by Rule VIII of the Commission, no part of the proceeds of sale of any common or Class A stock, proposed to be issued by the Central Public Service Corporation, shall be applied to any of the pecuniary-needs or requirements of the Hagerstown Light & Heat Company of Washington County, or of its gas plant, or be used in the purchase or acquisition of any bonds, stock, or other securities heretofore or hereafter issued by the said Hagerstown Light & Heat Company, or in any other way that would, or might, directly affect the welfare of the said Hagerstown Light and Heat Company, or its ability properly to perform its corporate duties.

TENNESSEE RAILROAD AND PUBLIC UTILITIES COMMISSION

Re Franklin Power & Light Company et al.

Municipalities — Occupation of streets by utilities — Authority of the state.

1. The general assembly of the state is competent to grant directly to telephone and telegraph companies authority to occupy the streets and roads of municipalities and counties of the state without first having obtained the consent of local authorities, p. 44.

Municipalities — Occupation of highways by utilities — Authority of the state.

2. The legislature itself having authority to confer jurisdiction on utilities to occupy streets of cities within the state can delegate such power to the governing bodies of the cities or to any agency which it might set up and clothe with jurisdiction for that purpose, p. 44.

Municipalities — Occupation of highways by utilities — Authority of the state.

3. A special act of 1903 delegating to a town the authority to grant occupational rights to an electric utility in its streets, was held to have the effect of repealing a general act of 1885 conferring such authority directly on the companies without requiring the consent of local authorities, p. 45.

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Statutes — Repeal by implication.

4. A special law under the cardinal rules of statutory construction cannot be repealed by implication by a subsequent general law, p. 45.

Statutes — Repeal by implication.

5. Where rights granted under a general law in 1885 have been taken away through repeal by operation of a conflicting special law of 1903, a subsequent statute in 1909 purporting to confer on electric companies "the same rights and powers" as were conferred on telephone companies by former laws of the state, was held not to have the effect of reviving such rights even as applied to electric companies, p. 45.

Public utilities — Charters — Election as to statutes — Electricity.

6. An electric company which had elected to take out its charter under an act requiring it to obtain first the permission from local authorities to occupy streets in municipalities was held to be bound by the provisions and limitations of its charter and not to be entitled to any benefits from an alternative act not requiring it to obtain such consent in view of the utility's exercise of its option to proceed under the former, p. 47.

Statutes — Construction — Passage on successive days.

7. The presumption must obtain that a legislature, by passing two laws on successive days, intended that both of them should become effective according to their express terms and not be construed as being in conflict, p. 47.

Commissions — General powers — Statutory construction.

8. A statute investing regulatory powers over utilities in the Commission was construed not to have the effect of taking away from municipalities their powers to have a voice in the granting of authority to utilities for the use of their streets, in view of the language of the statute expressly recognizing such local authority, p. 48.

Franchises — Respective powers of Commission and municipalities.

9. Municipalities, under certain statutes, have the power to grant franchises by ordinance to public utility companies desiring to occupy their streets, but such franchise ordinances must be approved by the Commission before they are valid, p. 48.

Franchises — Expiration — Municipal action.

10. A utility, upon the expiration of its franchise ordinance, was held not to have any further lawful right to occupy the streets of a municipality without first having obtained new franchise rights from the municipality where the board of aldermen had passed a resolution declaring that public necessity required a competing utility in that municipality, p. 49.

Service — Joint utilities — Right to operate.

11. The right of a public utility to continue to render electric service should not be dependent upon the continued operation by the utility of an unprofitable railway, but each service should be independent of the other, p. 49.

Franchises — Action of a municipality — Condition.

12. The governing body of a town was held to have no authority to impose in a franchise ordinance granted to a power and light company, a condition that such ordinance is subject to revocation in the event the

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company fails to continue an unprofitable railway in operation, and the Commission refused to approve such an ordinance, p. 49.

[September 20, 1929.]

APPPLICATION of an electric light company for approval of a franchise ordinance granted by a certain town; franchise disapproved in the form submitted and the cause retained on the Commission docket pending further negotiations between the parties.

By the COMMISSION: This controversy arises out of the joint application of the Franklin Power & Light Company and the town of Franklin filed with the Commission, seeking the approval by the Commission of franchise ordinance No. 141, passed by the board of mayor and aldermen of the town of Franklin on June 24, 1929, granting to the Franklin Power & Light Company a franchise for the purpose of constructing, owning, and operating an electric power and light plant to serve said town for a period of ten years.

The Southern Cities Power Company is at present operating such a plant in said town under a franchise granted to its predecessor, the Harpeth Electric Light & Power Company, but this franchise expired on August 4, 1929. Southern Cities Power Company is chartered under Chapter 127, Acts of 1909.

The Southern Cities Power Company concedes that its franchise right to occupy the streets of the town of Franklin expired on August 4, 1929, but contends that it, as an existing operating utility on that date, has the right to continue to occupy the streets of said town and to continue to serve the patrons of its lines and others desiring service, notwithstanding the expiration of its franchise rights. It

bases this contention upon the provisions of Chapter 151, Acts of 1909, coupled with the Public Utility Act, Chapter 49, Public Acts of 1919, and Chapter 87, Public Acts of 1923, and other Acts, together with the further insistence that, if the Southern Cities Power Company has the right to continue to serve this territory, no demand or necessity exists for the services of a competing utility in the same territory. Based upon these contentions, the Southern Cities Power Company filed a protest with the Commission, objecting to the approval by the Commission of the franchise ordinance granted by the town of Franklin to the Franklin Power & Light Company, which is effective for a 10-year period on and after August 4, 1929, unless sooner revoked under the terms of the ordinance.

Upon the filing of said protest, the town of Franklin and the Franklin Power & Light Company countered with a written motion to dismiss the protest filed by the Southern Cities Power Company, the motion being based upon the contention that the Southern Cities Power Company could not lawfully continue to occupy the streets of Franklin without the consent of the town of Franklin, evidenced by a franchise ordinance passed by the board of mayor and al-

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dermen, and that, failing to have such authority to continue to occupy the streets of the town, the Southern Cities Power Company was, in effect, after August 4, 1929, an "outlaw" in said town and without the requisite status as a competing public utility to be permitted to protest the approval by the Commission of the franchise ordinance granted to the Franklin Power & Light Company.

The Commission heard arguments on the motion to dismiss the protest of the Southern Cities Power Company, and at the conclusion of the same took said motion under advisement, and proceeded to hear the case on its merits, considering the proof offered by all parties to the controversy.

The town of Franklin was incorporated by special Act—Chapter 79, of the Acts of 1903. By sub-section 8, of § 8, of the charter of said town, authority is granted to the town "to provide for the lighting of streets." Sub-section 12, of § 8, of the charter authorizes the town of Franklin—

"To grant the right of way over streets, alleys, avenues, squares, and other public places of said town, for the purpose of street railroads or other railroads, telephones, telegraphs, gas pipes, electric lights, and such other purposes as the Board may deem proper; provided that they shall not grant the exclusive right to the use of streets and thoroughfares to any person, company, or corporation for more than twenty years."

Since the Southern Cities Power Company insists that telephone and telegraph companies have the right to occupy the streets of the cities of the state without permission from the

governing bodies of such cities, and that under the law it has these same rights, it becomes necessary to see what the law is as regards such rights of telephone and telegraph companies in order to dispose of this contention.

[1] Section 1, of Chapter 66, of the Acts of 1885 (Shannon's Code, § 1830) grants to telephone and telegraph companies express legislative authority to "construct, operate, and maintain such telegraph, telephone or other lines necessary for the speedy transmission of intelligence along and over the public highways and streets of the cities and towns of this state."

It was perfectly competent for the general assembly of the state to directly grant to telephone and telegraph companies this authority to occupy the streets and roads of the cities and counties of the state without first having obtained the consent of the city or county authorities, since the state, as the sovereign, could, under the law, exercise complete control and jurisdiction over the roads and streets located within the state or could delegate the jurisdiction and control of the roads and streets to any political governmental subdivision or agency set up and vested, by legislative authority, with such jurisdiction and control. This would be true regarding the use of the roads and streets by any public utility company.

[2] The various cities of the state have no inherent right outside of their charter authority to refuse to permit any public utility company to occupy their streets. They have only such authority in this regard as has been conferred upon them by the legislature except that the cities can exercise general police supervision and regu-

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lation over such companies after they have occupied the streets. The legislature itself can confer jurisdiction on public utilities to enter upon the streets of the cities of the state, or it can delegate this power and authority to the governing bodies of the cities, or it can delegate the same to any agency set up and clothed with jurisdiction for this purpose.

Chapter 151, of the Acts of 1909, at § 1, provides:

"That water and electric light, heat, and power companies created under the laws of this state . . . shall have and exercise the same rights and powers in respect to the erection and maintenance of poles and wires for the transmission of electricity for light and power purposes as are now conferred by the laws of this state upon telephone and telegraph companies for the transmission of telephone and telegraph messages."

The Southern Cities Power Company contends that the Act of 1909, last above referred to, confers upon it by express legislative enactment, and without the necessity for the consent of the town of Franklin, the right to continue to occupy the streets of said town to the same extent that a telephone or telegraph company could occupy said streets under the provisions of Chapter 66, Acts of 1885 (Shannon's Code, § 1830), and that by virtue of said two acts, it has the right to continue to occupy the streets of the Town of Franklin, without the consent of said town, for the purpose of distributing and selling electricity for light and power purposes.

[3] The Act of 1885 (Shannon's Code, § 1830) is a general law, and by its passage, authority was con-

ferred by express legislative enactment on telephone and telegraph companies, to string their lines over the public highways and streets of the cities and town of the state without authority from the governing body of any such city or town; but the general assembly incorporated the town of Franklin by special Act designated as Chapter 79, of the Acts of 1903, and conferred upon the board of mayor and aldermen of said town, authority "to provide for the lighting of streets" and authority "to grant rights of way over streets, alleys, avenues, squares, and other public places of said town for the purposes of street railroads or other railroads, *telephones, telegraphs*, gas pipes, *electric lights*, and such other purposes as the Board may deem proper."

(Underscoring ours.)

This special Act of 1903, being in direct conflict with the general Act of 1885 (Shannon's Code, § 1830), repealed the Act of 1885 to the extent of the conflict. It results that after the incorporation of the town of Franklin by the special Act of 1903, not even telephone and telegraph companies could enter the corporate limits of the town of Franklin for the purpose of stringing their wires along the streets without first having obtained the consent of the governing authorities of said town, since the authority to grant rights of way necessarily implies the authority to refuse the grant of such rights of way.

[4, 5] But it is insisted by counsel for the Southern Cities Power Company that the charter of the town of Franklin enacted in 1903, authorizing the town to grant rights of way by ordinances, is in effect repealed by

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Chapter 151, of the Acts of 1909. We cannot adhere to this contention for two reasons, namely: (1) because the charter Act of 1903 is a special law, whereas the Act of 1909 is a general law, and under the cardinal rules of statutory construction, a special law cannot be repealed by implication by a subsequent general law; and (2) the Act of 1909, conferring upon electric light, heat, and power companies the same right to occupy the streets of the cities of the state for the erection of poles and wires as were then conferred upon telephones and telegraph companies is not in conflict with the charter Act of the town of Franklin, because by the passage of the charter Act of the town of Franklin in 1903, the territory embraced within the corporate limits of the town of Franklin was excluded from the provisions of the Act of 1885, which granted to telephone and telegraph companies express legislative authority to occupy the streets of the cities of the state for the purposes of erecting poles and stringing wires. In other words, under the rules of statutory construction, the special charter Act of the town of Franklin, passed in 1903, being in conflict with the general Act of 1885, in so far as the territory embraced within the corporate limits of the town of Franklin is concerned. Therefore, when the Act of 1909, Chapter 151, was passed, conferring upon electric light, heat, and power companies "the *same rights and powers* in respect to the erection and maintenance of poles and wires for the transmission of electricity for light and power purposes *as are now* conferred by the laws of this state upon telephone and telegraph companies," no rights or pow-

ers then existed in telephone and telegraph companies to occupy the streets of the town of Franklin without the consent of said town, because such rights and powers had been taken away by the charter of the town enacted in 1903.

(Underscoring ours.)

Entertaining these views as to the proper construction to be given to the various statutes heretofore referred to, the Commission is of the opinion that the town of Franklin, acting through its governing body, has the power and authority to grant franchises to public utility companies to occupy the streets of said town, and that, without such franchise, no public utility company is authorized to so occupy said streets.

The Southern Cities Power Company is incorporated under the provisions of Chapter 127, of the Acts of 1909, and this Act in turn amends Chapter 142, of the Acts of 1875. Referring to § 3, of Chapter 127, Acts of 1909, it will be noted that corporations chartered under said Act are authorized to occupy the streets of the cities and towns of the state "after having first obtained permission from the governing authorities thereof."

Chapter 208, of the Acts of 1895, likewise amends Chapter 142, of the Acts of 1875, as well as Chapter 232, of the Acts of 1883. This latter Act provides for the formation of various kinds of corporations, including electric light and power companies, as does Chapter 127, of the Acts of 1909. The said Act of 1895 sets forth the form of charter to be used for the incorporation of water and electric light, heat, and power companies, and at § 3, provides that such companies

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may occupy the streets of the various towns of the State with their lines, conduits, etc.

[6] Thus it will be seen that the Southern Cities Power Company could have been incorporated under the provisions of Chapter 208, Acts of 1895, instead of under the provisions of Chapter 127, Acts of 1909. Both Acts were open for election to this company at the time it was chartered, and the company elected to take out its charter under the Act of 1909, which requires the company to first obtain permission from the governing authorities of any town in order to have authority to occupy the streets of that town. This latter Act is applicable in the main to those companies engaged in the distribution of power generally to retail customers, whereas Chapter 208, of the Acts of 1895, is designed to apply to those companies desiring to *manufacture* electricity and *construct* transmission lines to the point of retail distribution. Such manufacturing companies would, of course, not occupy the streets of any town as extensively and completely as would a distribution company. This is evidently the reason why the legislature authorized companies chartered under the Act of 1895 to occupy the streets of the towns without consent of the governing authorities thereof, and at the same time provided by § 3, of Chapter 127, of the Act of 1909, that companies chartered under that Act, should first obtain permission from the governing authorities of any town before occupying the streets of such town. The Southern Cities Power Company, having elected to take out its charter under the Act of 1909,

which requires it to first obtain permission from the town to occupy its streets, is manifestly bound by the provisions and limitations of its charter, and it recognized this by applying to the town of Franklin for renewal of its franchise.

[7] It is next insisted by the Southern Cities Power Company that Chapter 127, of the Acts of 1909, which was passed on February 18, 1909, and approved by the governor on February 25, 1909, was modified by Chapter 151, Acts of 1909, which was passed on February 19th, and approved by the governor on March 1st, so as to do away with the necessity for permission from the governing authorities of the city to occupy the streets thereof; but it is evident from the respective dates of passage of said Acts, that the two Acts were being considered by the legislature at the same time and that the legislature did not intend by the passage of Chapter 151 to repeal or modify Chapter 127, the presumption being that the legislature did not have under consideration at the same time and did not pass conflicting bills on successive days. The presumption must obtain that the legislature, by passing these two laws on successive days, intended for both to become effective according to the terms of said Acts, as expressed therein, and that said Acts were not to be construed as being in conflict; otherwise the Act which was subsequently passed would have been amended so as to expressly refer to and modify the prior Act, which was not done.

It results that the Commission reaches the conclusion that Chapter 151, of the Acts of 1909, confers upon

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water and electric light, heat, and power companies the same right to occupy the streets of the cities of the state as was then conferred upon telephone and telegraph companies, but that said Chapter 151, does not apply to electric light, heat, and power companies incorporated under Chapter 127, of the Acts of 1909, but only refers to such companies as may be incorporated under the provisions of Chapter 208, of the Acts of 1895, the latter companies being manufacturing and transmission companies which by the very nature of their business do not have to occupy the streets of any given town with as great number of poles, wires, conduits, lines, etc., as is necessary in the case of a company which distributes and sells electric current generally for light, heat, and power to all of the inhabitants of the city.

[8, 9] It is further insisted by the Southern Cities Power Company that Chapter 49, of the Public Acts of 1919, known as the Public Utility Law, embraces a comprehensive scheme of legislation and vests in this Commission complete jurisdiction and authority over all public utilities operating in the state, even to the extent of denuding the municipalities of the state of their granted charter rights to say by ordinance whether or not any particular public utility company shall be allowed to enter such municipality as a public utility and serve the citizens thereof. This contention is based largely on the Illinois Case styled *Chicago Motor Coach Co. v. Chicago*, decided in June, 1929, by the supreme court of Illinois, that court holding that under the Illinois Public Service Law, the cities and

villages of Illinois no longer had anything to say about whether or not motor bus operation could be carried on through such cities and villages, but that if the Public Service Commission of Illinois granted a certificate of convenience and necessity authorizing the holder thereof to operate motor busses over any given highway of the state which might lead through any of the cities of the state that the holder of such certificate could carry on such operation without the permission from the governing body of any such city. An examination of the Illinois law reveals the fact that it vests fuller and more complete jurisdiction in the Illinois Commission than is vested in the Tennessee Commission by Chapter 49, Public Acts of 1919, creating the Commission.

It is provided by § 7, of the Act of 1919, "that no privilege or franchise hereafter granted to any public utility as herein defined, by the state of Tennessee or by any political subdivision thereof, shall be valid until approved by said Commission, such approval to be given when, after hearing, said Commission determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interest. . . ."

The Tennessee Act, therefore, by the section above quoted, expressly recognizes the right and power of the municipalities of the state, otherwise having the power, by charter, to initiate by ordinance the matter as to what particular public utility shall occupy the streets of such city, but after the ordinance is passed and the franchise thereby granted, it is incumbent upon the municipality and the holder

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of the franchise to submit such ordinance for approval to this Commission before the same shall be valid. In other words, under a proper construction of these Acts, the Commission is of the opinion that where the power to grant rights of way exists in any municipality by the terms of its charter, that such power continues to exist after the passage of the Act of 1919 to the extent of permitting the city to pass an ordinance granting the franchise, but that such franchise must be approved by this Commission before the same becomes valid. It, therefore, results that the town of Franklin, under the various statutes heretofore referred to, has conferred on it the power to grant franchises by ordinance to public utility companies desiring to occupy its streets, but that such franchise ordinance must then be approved by this Commission before the same is valid.

[10] We are of the opinion that Chapter 87, Public Acts of 1923, does not apply in the present controversy, for the reason that the board of mayor and aldermen of the town of Franklin have passed a resolution in compliance with § 6, of said Act, declaring that a public necessity requires a competing company in that municipality.

From the foregoing, this Commission concludes that the Southern Cities Power Company, after the expiration of the franchise ordinance on August 4, 1929, which was formerly granted to the Harpeth Electric Light & Power Company, no longer has any lawful right to occupy the streets of the town of Franklin without first having obtained such franchise right by ordinance duly passed

by the board of mayor and aldermen of said town.

Having reached this conclusion, we next pass to a consideration of the ordinance submitted for approval by the Franklin Power & Light Company and the town of Franklin.

It will be noted by reference to § 7, of the franchise ordinance, that it is provided "that the franchise and rights herein granted to the Franklin Power & Light Company, its successors and/or assigns, have been and are hereby granted upon the condition that the Nashville Interurban Railway, its successors and/or assigns, will continue the operation of the electric railway between the city of Nashville and the town of Franklin, Tennessee, the same to be maintained in condition to render a reasonable and adequate service, and with frequency of trips not less than it makes at the present time, and should the operation of the said electric railway be discontinued in the future, or it cease to be maintained and operated, as hereinabove set forth, then in that event the board of mayor and aldermen of the town of Franklin, if they elect so to do, shall have the right to revoke this franchise, and, in this event all rights hereby granted to said Franklin Power & Light Company, its successors and/or assigns, shall cease."

[11, 12] The proof in this case shows that there has been operated for years between the town of Franklin and the city of Nashville an interurban railway known as the Nashville Interurban Railway; that said railway has been operated at a loss for some time past; that the rolling stock of said railway has been permitted to deteriorate and that the roadbed, includ-

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ing ties, bridges, rails, etc., and the power lines used in connection with said operation, have all been allowed to run down, so that considerable repairs would be necessary to put said interurban in first class condition. The Commission is of the opinion that the furnishing of light and power by any public utility company to the citizens of the town of Franklin should not be dependent to any degree upon the continued operation of the Franklin Interurban Railway between Nashville and Franklin, and that the public convenience and the public interest of power and light users in the town of Franklin would not be properly conserved by making the service contingent or dependent upon the continued operations of said interurban, and that the right of any public utility company to continue to serve the citizens of Franklin with power and light should not be dependent upon the continued operation of the interurban; but that the Nashville Interurban Railway and whatever company serves the citizens of Franklin with power and light should each stand upon its own bottom, and neither should be depended upon the other. The Commission is of the opinion, from an inspection of the charter of the town of Franklin that the governing body of said town has no authority under its charter to impose in a franchise ordinance granted to a power and light company the condition that such ordinance is subject to revocation in the event an interurban railroad does not continue to operate between the town and a neighboring town.

Entertaining these views, both as to the law and as to whether this franchise ordinance is necessary and

proper for the public convenience and properly conserves the public interest, the Commission is of the opinion that such ordinance in its present form should not be approved by this Commission. The provisions of the franchise ordinance, above quoted, permitting the board of mayor and aldermen of the town of Franklin to revoke the same in the event the Nashville Interurban Railway should cease to operate must be presumed to have been inserted in the ordinance for some purpose, and in the event the interurban should discontinue operations, then the board of mayor and aldermen would be placed in position where they could terminate the ordinance by revocation, and if they should elect to do this, the customers of the Franklin Power & Light Company would then be put to the inconvenience of having their service interrupted during the period of dismantling the plant of that company and constructing and connecting the lines of any new company which might succeed in obtaining a franchise from the town. This certainly would not serve the public convenience and the public interest of the citizens of the town of Franklin, in the opinion of the Commission. Even a franchise granted for a period of ten years would be for an exceedingly short time without having tied to it a condition whereby it might be sooner revoked, and such revocation would necessarily very greatly inconvenience the customers of such a company.

It is therefore *ordered* by the Commission:

1. That before any electric light and power company can lawfully occupy the streets of the town of

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Franklin, such company must first have granted to it by ordinance passed by the board of mayor and aldermen of said town, a franchise, which ordinance must be approved by this Commission.

2. That Ordinance No. 141, granted to the Franklin Power & Light Company by the board of mayor and

aldermen of the town of Franklin on June 24, 1929, is not in such form as to meet the approval of this Commission, for the reasons set forth in the foregoing opinion, and the same is, therefore, disapproved.

3. This case will be retained on the docket for such further orders as may be deemed necessary.

VIRGINIA STATE CORPORATION COMMISSION

Ex Parte Lexington Telephone Company

[Case No. 3727.]

Return — Amortization of rate case and accounting expenses.

1. The ordinary expenses in connection with the installation of accounting systems and legal fees in connection with rate cases were held more properly amortized over a period of five years than included in current operating expenses, p. 54.

Depreciation — Percentage allowed — Telephones.

2. The Commission declined to increase the annual allowance of a telephone utility for depreciation from 5 to 6 per cent of the book cost of its depreciable property, p. 54.

Return — Amortization of rate case expense — Success of utility.

3. In the amortization of rate case expense, only one-half the total amount was permitted to be charged against the rate-paying public in view of the fact that the application for increased rates by the utility was denied, p. 55.

Return — Percentage allowed — Telephone utility.

4. The Commission declined to permit increased telephone rates where present revenues yielded from 7.03 to 7.86 per cent approximately for return on the fair value of the property, p. 55.

[August 30, 1929.]

APPPLICATION of a telephone utility for increased rates; denied.

HOOKE, Commissioner: The Lexington Telephone Company (hereinafter referred to as the Company) filed its petition with the State Corpo-

ration Commission on September 29, 1928, asking for certain increases in its rates and charges over those established by the Commission's order

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of March 1, 1927, P.U.R.1927C, 730, for telephone service in the town of Lexington, Virginia, to become effective on and after November 1, 1928. The increases asked for were 50 cents per month on one and two-party business telephones and 25 cents per month on one and two-party residence telephones.

The town of Lexington, through its attorneys, protested against the proposed increases of the Company and the matter was, therefore, set down for hearing before the Commission. The case was heard on December 18, 1928, with Chairman Hooker and Commissioner Fletcher sitting, and taken under advisement.

At the time of the hearing on December 18, 1928, no further inventory and appraisal of the Company's property was submitted. After the Commission's opinion was rendered, as of March 1, 1927, *supra*, the Company employed accountants for the installation of a system of accounting so as to remove the criticism directed against the Company in that case as to the condition and method of keeping its books and records. It appears now that the books and records of the Company are in good shape. At the time the accountants were employed the plant accounts were adjusted to agree with the valuation placed on the property by the Commission in the former case. These accounts have been kept up to date by proper additions and betterments and such retirements as have been made.

In the present case, evidence was submitted on behalf of the Company by Mr. C. G. Van Emon, certified public accountant of Washington, District of Columbia, showing an

analysis of the balance sheet, income and expense accounts, additions and retirements to plant, etc., up to July 31, 1928.

The town of Lexington also presented an accounting report made by Mr. George R. Geddy, certified public accountant of Richmond, Virginia, showing comparative balance sheets, operating statements, analysis of additions and retirements from December 31, 1926 to July 3, 1928, and an analysis of certain pay roll and other expense accounts.

Due to the unavoidable delay in deciding this present case, the Commission deemed it wise to have before it information brought down to a later date than July 31, 1928. Therefore, the Company was requested to furnish an analysis of its operating revenues and expenses for the first six months of 1929, as compared with the same period for year 1928. By having this before us a forecast of operations for the full year 1929 can be more accurately made. This information, as of June 30, 1929, was furnished the Commission by the accountants under date of July 17, 1929, and is hereby made a part of the record in this case.

Valuation

The fair value for rate-making purposes determined by the Commission in the former case was as of June 1, 1926. Net additions and betterments since that date are shown to be as follows:

June 1, 1926 to December 31, 1926	\$3,132.15
January 1, 1927 to December 31, 1927	9,630.30
January 1, 1928 to December 31, 1928	1,759.04
Total	\$14,521.49

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It was brought out during the hearing that the additions for the year 1927 contained an item of \$2,500 covering the purchase price of a piece of land containing about an acre and an eighth adjoining the property upon which the exchange is located. Witnesses of the Company acknowledged that the entire lot was not being used for telephone purposes. It appears that only about one-fourth of the lot is actually used by the Company for a pole yard, etc. Witnesses for the town of Lexington placed a value on the portion used at from \$500 to \$700, while the Company witnesses placed a value at one-half the entire lot, or \$1,250.

In view of the evidence and also from an inspection made by representatives of this Commission, the Commission is of the opinion that the fair value of the portion of this land used and useful for telephone purposes is \$750.

Included in the additions for 1928 is an item of \$269.20 charged to the land account. It appears that this was in connection with the portion of land not used and useful and should also be excluded for rate-making purposes.

Excluding these items, the net additions for the period June 1, 1926, to December 31, 1928, amount to \$12,502.29.

Therefore, adding the net additions to physical property in the former case, deducting the same depreciation and allowing the same amounts for working capital and going value, the Commission is of the opinion that the present fair value of the property of the Lexington Telephone Company for rate-making purposes as of De-

cember 31, 1928, is approximately \$97,000, and so finds.

Revenue and Expenses

Revenues of the Company have shown an increase every year since 1926. Gross revenue for the year 1928 amounted to \$40,344.33. For the first six months of 1929 they were \$20,907.92, as compared with the revenues for the first six months of 1928 of \$19,896.11, which shows a continued increase. On this basis it is estimated that the total revenues for the entire year 1929 will amount to about \$42,500.

Operating expenses have also shown an increase, with a very decided increase just after the Commission's decision in the former case. A detail of the expense accounts is as follows:

	Actual 1928
600 Repairs of wire plant	\$2,941.70
610 Repairs of equipment	2,888.52
620 Station removals and changes	145.62
630 Depreciation — plant and equipment	6,046.48
640 Other maintenance expense ..	1,224.98
650 Operator's wages	8,651.15
660 Other traffic expense	849.76
670 General office salaries	6,311.01
680 Other general expense	5,706.92
Sub-total	\$34,766.14
350 Taxes	1,777.65
370 Uncollectible accounts	147.00
Total	\$36,690.79

Most of the increases are in general office salaries, attorney's fees, accountant's fees, clerical help, and operator's wages. However, the increase in operator's wages was in accordance with views expressed by the Commission in the former case. The item for general office salaries was criticised considerably by the town of Lexington. The evidence shows that

VIRGINIA STATE CORPORATION COMMISSION

the salaries of both the president and secretary-treasurer were increased so that they are now drawing a total of \$7,600 from the Company. All of these salaries are not charged directly to the "General office salaries" account but are split arbitrarily and distributed to the various accounts. As noted above, the amount charged to the "General office salaries" account for 1928 was \$6,311.01, or 15.6 per cent of the gross revenues.

Comparison with other companies were made by the witnesses of both the Company and the town of Lexington, as to this account. Following such comparisons further, the Commission has made a study of the "General office salaries" account of all the telephone companies reporting to it, in relation to gross revenues. This shows that for the year 1928 the Lexington Telephone Company, out of about twenty companies, ranked as the fourth highest in its ratio of "General office salaries" to gross revenues. For the year 1927 it ranked third. Therefore, it appears to the Commission that the charges to this account of \$6,311.01 are unreasonably high for this Company. In view of this, the Commission is of the opinion that the charges to this account should not exceed \$5,000.

[1] The Company has followed the practice of charging each year to account No. 680—"Other general expenses," the total of such unusual expenses as the accounting fees in connection with setting up its accounting system, the accounting and legal fees in connection with rate cases, etc. This is in accordance with the view of Mr. Van Emon, as expressed in his evidence during the hearing. This

Commission does not agree with this view, but has consistently held, in all other cases before it, that such items should be amortized over a period of years. This period has generally been five years and we think this to be proper in this case.

It appears that for the year 1928 the Company had charged to "Other general expense" the sum of \$1,475.98 representing work in connection with setting up its accounting system. In accordance with views expressed above this \$1,475.98 should be deducted from account No. 680 and amortized over 5-year period.

[2] As to the question of annual depreciation expense Mr. Van Emon testified for the Company that in his opinion the annual rate of depreciation should be 6 per cent instead of the 5 per cent allowed by the Commission to this Company in the 1927 Case (P.U.R.1927C, 730). Mr. Geddy, on the other hand, stated in his testimony that he saw no reason why this rate of depreciation should be increased at this time. The Commission's own analysis of the depreciation account, etc., and the Company's experience at the present time does not show sufficient reason why the 5 per cent allowed in the former case should be increased to 6 per cent, as asked for by the Company. The accounts show that during 1928 the Company charged to depreciation the sum of \$6,048.48. Our calculations show that this should have been \$5,340.75, which is on the basis of 5 per cent as allowed in the other case. The total book value on the Company's books as of December 31, 1927, was \$120,677.14. Of this total there was \$13,862 representing land

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and intangibles. Deducting this we have \$106,815.14 as the total amount of depreciable property, against which the 5 per cent should be charged for depreciation expense in 1928.

Making these adjustments we then have \$33,198.07 as representing a reasonable and normal year with 1928 as a basis.

The total expenses for the first six months of 1929 as shown by the books were \$21,349.81. Included in these expenses, however, are the following charges made in connection with the present rate case:

Legal expense	\$1,007.80
Accounting expense	1,000.00
Transcript of record	49.64
Total	<u>\$2,057.44</u>

Eliminating these items of rate case expense and using the expenses for the first six months of 1929 in comparison with similar period in 1928, and making similar adjustments in 1929 estimate as made above for the 1928 expenses, etc., we estimate that the reasonable and normal expenses for the entire year 1929 will be approximately \$34,880. Deducting this sum from the estimated revenue of \$42,500 will give a net revenue of \$7,620, or 7.86 per cent on the fair value. This, however, eliminates all rate case and accounting expenses.

It appears that the expense in connection with setting up the accounting system amounted to \$1,524.75 for the year 1927, and \$1,475.98 for the year 1928, making a total of \$3,000.73.

This will be allowed by the Commission, but should be amortized over a period of five years, or at \$600 per year.

[3] As to the expense in preparing and presenting this present rate case, which amounted to \$2,057.44, the Commission is of the opinion that, under the circumstances of this case and in view of the fact that the application for increased rates will be denied, only one-half of this amount should be charged against the rate-paying public. This amount amortized over a period of five years will be approximately \$200 per year.

[4] Making these allowances for amortization of the accounting and rate case expenses, the estimated expenses for the entire year 1929 will be approximately \$35,680. This estimate compares very favorably with the Company's forecast of \$35,370.56 for twelve months, under 5 per cent depreciation and anticipated economies.

Upon this basis the net revenues will be approximately \$6,820, or 7.03 per cent on the fair value of the property.

Therefore, it appears that the Company's return under reasonable and normal operations will vary between 7.03 per cent and 7.86 per cent. With these earnings, the Commission is of the opinion that increased rates are not necessary and that the petition of the Company should be denied. An order will be entered carrying out the views expressed herein.

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This will be allowed by the Commission, but should be amortized over a period of five years, or at \$600 per year.

[3] As to the expense in preparing and presenting this present rate case, which amounted to \$2,057.44, the Commission is of the opinion that, under the circumstances of this case and in view of the fact that the application for increased rates will be denied, only one-half of this amount should be charged against the rate-paying public. This amount amortized over a period of five years will be approximately \$200 per year.

[4] Making these allowances for amortization of the accounting and rate case expenses, the estimated expenses for the entire year 1929 will be approximately \$35,680. This estimate compares very favorably with the Company's forecast of \$35,370.56 for twelve months, under 5 per cent depreciation and anticipated economies.

Upon this basis the net revenues will be approximately \$6,820, or 7.03 per cent on the fair value of the property.

Therefore, it appears that the Company's return under reasonable and normal operations will vary between 7.03 per cent and 7.86 per cent. With these earnings, the Commission is of the opinion that increased rates are not necessary and that the petition of the Company should be denied. An order will be entered carrying out the views expressed herein.

COLORADO PUBLIC UTILITIES COMMISSION
COLORADO PUBLIC UTILITIES COMMISSION

Re Home Gas & Electric Company

[Application No. 1232, Decision No. 2241.]

Certificates — Conditions — Construction prior to the exercise of right.

1. The Commission may not authorize the exercise, by an applicant for a certificate of convenience and necessity, of a right granted by its franchise to construct and operate a generating plant where the applicant signifies no present desire or intention to construct such a plant, as actual construction is a condition precedent to the grant of such authority, p. 57.

Franchises — Proper taxation — Electricity.

2. Payment by a utility to a city in return for franchise authority to operate therein is warranted only where the money paid is to meet some expense which the city has in connection with the passage of the franchise and the operation of the utility; but it is not warranted where it is merely a sort of consideration for granting the franchise, p. 57.

Franchises — Gross receipts — Electricity.

3. While the Commission would not approve the requirement of a gross receipts percentage to be paid to a city as a franchise tax in the absence of a showing justifying the same, it did not feel warranted without protest on the part of any of the customers of the utility in taking any action with respect to such payment, p. 58.

Discrimination — Free service — Franchise tax.

Statement that there is no difference in principle between giving free service to a city and the payment of money to a city merely as a consideration for granting a franchise, p. 57.

[May 24, 1929.]

APPPLICATION of a gas and electric company for a certificate of convenience and necessity; granted.

APPEARANCE: Walter E. Bliss, Greeley, Colorado, attorney for applicant.

Statement.

By the COMMISSION: This is an application by the Home Gas & Electric Company, for a certificate of public convenience and necessity, authorizing exercise by the applicant of the franchise rights granted to it by the city council of the city of Greeley, Colorado.

On March 4, 1924, the city council of the city of Greeley passed an ordinance granting to the applicant, its successors, and assigns, "the right, privilege, and authority to erect, construct, maintain, and operate a sub-station or substations, an electric light and power plant, and a distribution system for the transmission, distribution, and sale of electrical energy within the corporate limits of the city of Greeley, and any additions thereto,

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Weld county, Colorado, and repealing all ordinances or parts of ordinances in conflict herewith."

The applicant first sought authority from this Commission to exercise the said franchise rights by filing its application herein on November 27, 1928. The evidence showed, however, that the failure of the applicant to seek authority sooner was not due to any contemptuous disregard of the jurisdiction of the Commission, but was due to its lack of knowledge that the law compelled it to secure such authority. It appeared also that as soon as it learned of the necessity of securing a certificate from this Commission, it immediately filed its application.

[1] The applicant is, and has been ever since prior to the granting of the franchise in question, engaged merely in the distribution of electrical energy. It does not at this time desire or intend to construct a plant for the generation thereof. Since the showing that public convenience and necessity require the construction of a generating plant as a condition precedent to the making of an order authorizing such construction, the Commission cannot at this time authorize the exercise by the applicant of the right granted by the franchise to construct and operate a plant.

The capital to be invested by the applicant is \$478,464.74.

No other utility is engaged in either the generation or distribution of electrical energy in the city of Greeley or surrounding territory.

[2] The first paragraph of Article V of the ordinance granting the franchise reads as follows:

"The company shall pay to the city

1 per cent of its gross earnings within the city of Greeley, including in the computation of such gross earnings all amounts paid by the city to the company for electricity or electrical energy, but in no event shall said payment be less than \$600 per annum, which amount per annum the company agrees to pay as the minimum."

If the amount of money required to be paid to the city by the utility is only enough to compensate the city for the expense it incurs in connection with the franchise, such as a study and investigation preceding the granting thereof, and the occupancy of the streets with the wires and poles of the company, the payment is warranted. However, if the money paid to the city is not to meet any expense which the city has in connection with the passage of the franchise and the operation of the utility, but merely as a sort of consideration for granting the franchise, then we believe the payment is not warranted.

There are numerous cases holding that it is improper for a municipality to receive free service from a public utility. The reason for that position is that the utility collects enough from its customers to pay for the cost of free service to the city, resulting in the customers of the utility being compelled to contribute money which should be raised from the taxpayers generally.

We see no difference in the principle between giving free service to a city and the payment of money to a city merely as a consideration for granting a franchise, because in the latter case the city obtains money to defray the municipal expenses which should come from all the taxpayers

COLORADO PUBLIC UTILITIES COMMISSION

and not merely those who are customers of the utility. A municipality has been given by the legislature certain powers respecting public utilities, including the power to grant franchise rights in the streets. These powers are to be exercised for the benefit of the citizens, the municipality acting as a sort of trustee. Since the customers of the utility in the end pay whatever consideration the city receives for issuing the franchise, the effect of the requirement of the payment of the consideration is to force the customers of the utility to pay the taxpayers in general for the privilege of securing service of the utility. We cannot see any justification for the requirement of such a payment.

A general statement of the situation is found in Vol. I, Guiding Principles of Public Service Regulation, by H. C. Spurr, p. 3.

"Another objection to these local franchise contracts was the discriminatory provisions which almost always existed against the ratepayers of the utility in favor of taxpayers who were not users of the utility service. The municipalities, for example, invariably provided for free service for themselves. This was a species of special taxation which discriminated against a particular group of taxpayers. Another type of discrimination much in favor during the days of home rule consisted of the putting of certain burdens upon the 'company' as a condition of granting the local franchise. These obligations were probably imposed upon the theory that it was the corporation which would have to bear them. The patrons of the company no doubt

joined in the view that the harder the bargain for the company, the greater the benefit to its consumers, overlooking the fact that it is the consumers—not the company—who have to pay. If the companies were to render service under the conditions imposed, these demands of the home authorities, whether in the form of taxation or special services required by the companies, really amounted to a discrimination against the consumers of the particular utility service in favor of nonconsumers."

[3] However, we note from said article that this payment to the city is intended to be in lieu of pole and wire license fees which might lawfully be required by the city to be paid by the applicant. Therefore, while the Commission cannot properly put its stamp of approval upon the requirement of the payment of a fixed sum or percentage of the gross earnings to the city in view of the absence of any showing justifying the same, we do not feel warranted at this time without any protest on the part of any of the customers of the applicant in taking any action with respect to the said payment.

After a careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity requires the exercise by the applicant of those rights and privileges granted by said ordinance authorizing the construction and operation in the city of Greeley, Colorado, of a substation or substations, and a distribution system for the transmission, distribution, and sale of electrical energy in said city and any additions thereto.

RE NEW ENGLAND TELEPH. & TELEG. CO.
NEW HAMPSHIRE PUBLIC SERVICE COMMISSION

Re New England Telephone &
Telegraph Company

[D-1208, Order No. 2073.]

Rates — Filing of schedules — Bond to secure possible refund.

1. A telephone company was permitted to put into effect a schedule of rates upon the filing of a bond as surety, conditioned to refund to subscribers certain sums as might be collected in excess of rates finally established, where it was not practicable for the Commission to complete its investigation into the reasonableness of the rates filed within the time allowed, p. 60.

Apportionment — Telephone equipment — Private branch exchange.

2. Telephone equipment is so interrelated in its very nature and its use that segregation on the basis of cost of operation of the various classes of property used by the telephone company, with the exception of private branch exchanges, was held to be impracticable, p. 63.

Rates — Telephones — Private branch exchange — Cost of service.

3. Rates for private branch exchanges were based upon the cost of service in view of the fact that they constituted the only general class of telephone property susceptible to segregation on the basis of cost to render service, p. 63.

Discrimination — Telephones — Hotel branch exchanges.

4. There is no valid rate distinction between a hotel as a user of private branch exchange service and any other subscriber for such service, p. 64.

Rates — Telephones — Rural mileage rates.

5. Long rural telephone lines requiring an excess mileage rate constitute a type of service for which rates cannot be based upon segregated cost of operation, in view of the fact that if such test were applied some sections would be without service, p. 64.

[March 13, 1929.]

INVESTIGATION by the Commission into proposed telephone rates; rates revised.

APPEARANCES: George R. Grant, for the New England Telephone & Telegraph Company; Thorp & Branch, for the New Hampshire Hotel Association; J. F. McElwain Company, Nashua Manufacturing Company, Asbestos Wood & Shingle Company, Second National Bank, Wonalancet Company, Nashua Gummed & Coated Paper Company, Jerry J. Haggerty, for the Nashua Chamber of Commerce; Arthur Olsson, for the County of Cheshire; Foster & Lake, for the New Hampshire State Grange and the New Hampshire Farm Bureau Federation;

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Ray P. Hanscomb, for the Hotel Rockingham of Portsmouth; Philip E. Stevens, for the Maine Manufacturing Company of New Hampshire; Alvin J. Lucier, for the city of Nashua; DeWitt C. Howe, for the Amoskeag Manufacturing Company; Albert H. White, for the International Shoe Company.

BROWN, Commissioner: The New England Telephone & Telegraph Company, hereinafter referred to as the Telephone Company, on June 1, 1928, filed with the Public Service Commission a revision of § 3 of its schedule of rates, N. H. P. S. C. No. 66, which it proposed to put into effect July 1, 1928.

The Commission, by an order entered on the 5th day of June, 1928, directed the Telephone Company to file in all its exchanges in New Hampshire, copies of its proposed § 3, in order that the public might become acquainted with the contemplated changes, and further required the Telephone Company to publish said order at least twice in each of the daily newspapers in the state within the territory served, the last publication to be not later than June 23, 1928, which order was complied with.

[1] As there were numerous matters before the Commission demanding attention, it was not practicable to complete an investigation into the reasonableness of these rates until a later time. It was, therefore, determined by the Commission that the proposed revision of § 3 should become effective July 1, 1928, upon the filing of a bond by the Telephone Company, running to the members of the Commission, as trustees, in the

principal sum of \$35,000, with surety company as surety, conditioned to refund to the subscribers such sums as might be collected from them by virtue of said rates, in excess of the rates which might ultimately become lawful upon the final disposition of the case. Such a bond was filed and the rates in questions were made effective July 1, 1928.

The Telephone Company presented its direct case on November 14 and 15, 1928, without interruption for cross-examination. On December 3rd and 4th, counsel cross-examined on behalf of the New Hampshire Hotel Association. Counsel did likewise, representing rural line and service line subscribers, and witnesses were also presented who objected to payment of increased mileage charges. Certain evidence in rebuttal was presented by the Telephone Company. Further statements came from large business interests in Manchester and Nashua, concerning private branch exchange rates. The hearing was then adjourned to December 24th for argument, at which time counsel for the New Hampshire Hotel Association, as well as the Telephone Company, argued in behalf of their respective clients. No other oral argument was given at this time, however, counsel for the rural subscribers presented a written argument embracing the claims of those whom he represented. Memoranda of their respective arguments before the Commission have been filed by counsel for the New Hampshire Hotel Association and the Telephone Company.

The memorandum of the Telephone Company included an analysis of the evidence, and references to many deci-

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sions of courts and Commissions are cited in support of its position. It gave a resume of the testimony of its engineering, accounting, and commercial witnesses, with reference to exhibits which they had presented, nineteen in number, and by applying the law as set forth in the cases to which it referred, it concluded that the rates at issue are as low as they should be, having in mind the rights of the owners of the property and the value of the service to the subscribers.

The Hotel Association presented no witnesses on material issues involved in the case, and its argument was, therefore, limited to conclusions from cross-examination, together with suggestions with relation to, and criticisms of, the Telephone Company's methods.

Reference should be made at this point to an order of the Commission, issued on March 25, 1926, in case "D—964, Re New England Teleph. & Teleg. Co. X N. H. P. S. C. R. 305, 309, P.U.R.1926E, 186, 190. Investigation of the Lawfulness and Reasonableness of a Proposed Increase in Exchange and Toll Rates." That order was the result of a careful analysis of all phases of an investigation conducted in 1925 and 1926, after twenty-five days of hearing, during which the interested parties presented nearly two hundred exhibits by trained and competent witnesses. In its order in this earlier case, the Commission stated:

"Like all rate cases, this case must be decided upon the law and the evidence disclosed by the record. The Commission's findings must be based upon facts and not sentiment. In reaching its conclusions, it must be

guided by the law as laid down by the courts, and not by theories, which are in conflict with court decisions, however persuasive and convincing they may be. The Commission has no power to change the law or the facts. It must be diligent to ascertain the facts, which requires a painstaking, careful consideration of all the evidence before it, but, after the facts have been determined the legal principles applicable to the decision of rate cases, which have become pretty well established, must be followed."

The above statement is equally applicable in the case at hand.

In its report and order of March 25, 1926, *supra*, the Commission dealt with the history and activities of the Telephone Company and its relations with the American Telephone & Telegraph Company and the Western Electric Company. References to these matters and the citations of law contained in the order need not be repeated here.

The present proceeding is, in effect, a continuation of the former investigation, since it deals with a section of the Telephone Company's rate schedule previously considered and disapproved by the Commission, but on the ground that the Telephone Company by its own estimates did not need at that time, the added revenue which the rates in question would produce. On the evidence, the rate schedule as approved in 1926, has produced less revenue than the Telephone Company contemplated therefrom.

Issue.

The issue which the Commission is called upon to decide now is whether or not the rates and charges set

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forth in revised § 3 of the Telephone Company's tariff N. H. P. S. C. No. 66, are just, fair, and reasonable. The determination of this issue involves a consideration of the present fair value of all the Telephone Company's property in New Hampshire as a going concern, the return on that property under present rates and the fairness of the rates from the standpoint of relative value of service, and the rate schedule as a whole.

Rate Base.

Mr. Manson, Chief Engineer for the Telephone Company, testified at length as to the value of its property in New Hampshire. Having previously ascertained the value of the property to have been \$12,500,000 as of April 1, 1925, he made a valuation for the purposes of the present case as of July 1, 1928. Explaining how he arrived at his conclusion he stated that in his opinion the fair value as of the later date was \$14,000,000. The Commission found in the former case that the fair value of the plant and property of the Telephone Company in New Hampshire, as of April 1, 1925, was \$10,500,000 and arrived at this conclusion after a consideration of all the elements of value, including original cost, reproduction cost net less depreciation, working capital, and cost of establishing the business. Considering the same elements as of July 1, 1928, we find the fair value to be \$13,000,000.

It is well settled that public service corporations are entitled to earn not less than a fair return upon the fair value of their properties devoted to the public service. This is established by a long line of decisions by both

courts and Commissions, and is too well understood to require authorities.

The accounting testimony of Mr. Moore, the general auditor of the Telephone Company, which stands undisputed, shows that in 1926 the net earnings of the Telephone Company in the state produced a return, on the average total plant, general equipment and working capital, of 6.260 per cent, which in 1927, by reason of an increased amount of plant, became 5.75 per cent, and in 1928 was reduced to 5.147 per cent. The increased revenue under the new rates was considered for the last six months of the year 1928. Mr. Heath, the general commercial engineer of the Telephone Company, stated that this increase would amount to \$67,000 per year.

The general auditor, aforesaid, pointed out that these figures of return are on cost of property only and not value, and include nothing for cost of establishing the business or going value. Under the facts in this instance, the Telephone Company is undoubtedly entitled to earn, upon these elements, as well as upon the value of physical plant.

In view of our conclusion in our order of March 25, 1926, X N. H. P. S. C. R. 305, P.U.R.1926E, 186, that the Company was then entitled to a return of 8 per cent, which conclusion we see no reason to depart from at the present time, it is apparent that under the rates as they existed prior to July 1, 1928, the Telephone Company was earning considerably less than a fair return, and that the return under present rates remains less than fair. It follows, therefore, that the rates in § 3 should be approved, unless unfair or illegal for some reason other

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than the return to the Telephone Company.

Private Branch Exchange Rates.

[2, 3] Some opposition to the private branch exchange rates, as set forth in revised § 3, developed at the hearing on the part of the New Hampshire Hotel Association and certain large manufacturing and business enterprises of the state. Representatives of these protestants argued that the rates for this service should be based upon cost and that the percentages of increase are of themselves evidence that the present rates for private branch exchange systems are excessive. Telephone equipment is so interrelated in its very nature and its use, that segregation on the basis of cost of operation of the various classes of property used by the Telephone Company in the public service appears impracticable. Having determined in any given case the question of return as affected by revenues, expenses, and valuation of property, the fairness of rates for individual classes of service must be judged by comparison with rates for other classes of service enumerated in the same rate schedule, and the value of the service to the subscribers, with such regard to costs of rendering such classes of service as is possible.

With respect to private branch exchange switchboards, it is practicable to compare the rates therefor with the cost of the service. These switchboards are pieces of equipment installed largely for the subscribers' benefit, between the Telephone Company's central office and the subscribers' telephone stations, and are operated by the individual subscriber

and for the individual subscriber. For this equipment, the installation costs, the annual charges, and the revenues therefrom may be determined. In case of a central office switchboard, however, it appears not now possible to segregate the costs and revenues for any individual class of service. That is also true of other types of telephone plant. After careful investigation into this question, we are of the opinion that private branch exchange switchboards constitute the only general class of telephone property thus susceptible to segregation on the basis of cost to render service.

It appears from the testimony of Mr. Manson, that under the rates at issue, the cost to the Telephone Company of furnishing these boards in New Hampshire is \$4,081 per year in excess of the revenue therefrom, and that prior to the increase in the rates therefor, that deficiency was \$18,304 per year, figuring in both instances the cost of money at 6 per cent. The unfairness of the former switchboard rates is apparent and although we are not prepared at this time to approve entirely the present switchboard rates, we believe that certain increases are justified.

Testimony relative to percentages of increases to show that they are either fair on one hand or unreasonable on the other, is not convincing. One must know whether former rates for any class of service were fair and reasonable in order to determine whether such percentages are proper. The private branch exchange switchboard rates in New Hampshire, which were in effect just prior to July 1, 1928, had been the lawful rates for this class of service for many years.

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It is not necessary to discuss the economic changes which have affected prices during that period, for everyone knows that there have occurred many such changes.

It is clear that if the Telephone Company needs added revenue, it should seek it by a change in rates of such long standing, especially when it is shown that they have not produced their fair share of the company's revenues in the past.

From the standpoint of value of the private branch exchange system, it is our view that such a system is of advantage for the following reasons: it results in expediting the service; it produces various economies in the conduct of business by reason of the convenience of ready intercommunication which it affords; it results in service at a lower cost than would result for a similar amount of service over individual lines.

[4] The Hotel Association proved no distinction between a hotel as a user of private branch exchange service and any other such subscriber, and we see none.

Rural Line Mileage.

[5] Opposition appeared at the hearing with relation to the increases in rural line mileage charges. While it is true that mileage charges are not applied within 6 miles from the central office, yet in the case of the extremely long rural lines where mileage is applied, these increased charges now in effect appear to us to be somewhat high. This cannot be said to be true

of course, upon the basis of cost. From such studies as the Commission has made from time to time in the exercise of its regulatory duties over telephone companies, we are satisfied that many of these lines are operated at a loss when such operation is considered by itself and not as part of a system operation. This appears as a strong reason against the theory of making telephone rates for various classes of service upon the basis of segregated costs of operation. If the cost basis should prevail as the sole test, it is not unlikely that some rural sections now served would be without service, and the Commission would be without authority in the premises.

As to the other rates in revised § 3, Mr. Heath for the Telephone Company explained in detail the application of all said rates, and the reason for the changes which they involve. After examination and consideration, we find no cause to disallow them.

For reasons above stated, we find that the schedule of rates filed with the New Hampshire Public Service Commission by the Telephone Company, known as Revision of § 3, Entire, of N. H. P. S. C. No. 66, excepting the rates therein contained relating to rural line mileage, and with certain modification in the rates for cord type private branch switchboards, should be allowed.

An order will issue accordingly.

Storrs and Morse, Commissioners, concurred.

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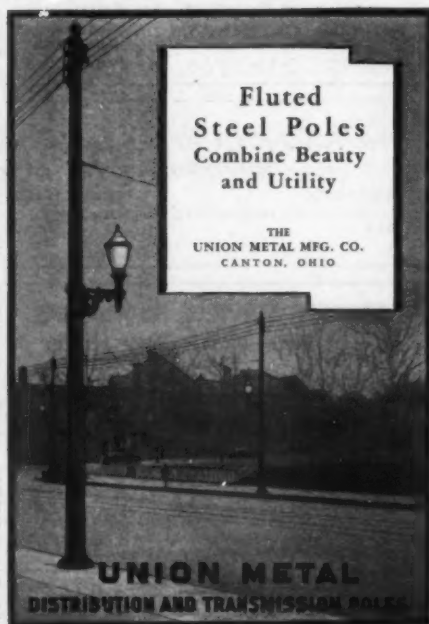
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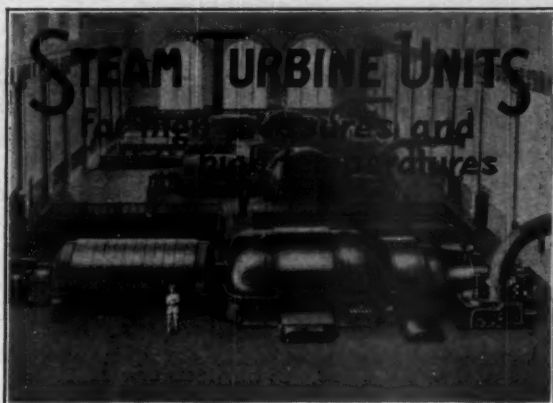
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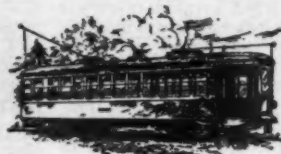
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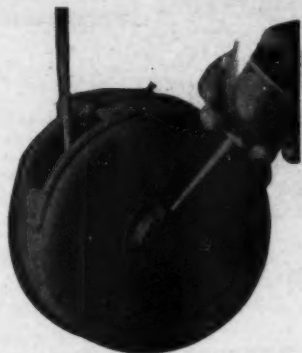
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